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TECHNOLOGICAL
ALTERATIONS
TO
MOTION PICTURES

APPENDIX II
TRANSCRIPT OF HEARINGS

MARCH 1989

Joe/VL
A REPORT OF
THE REGISTER OF COPYRIGHTS



COMPLETED

IN THE COPYRIGHT OFFICE
WASHINGTON, D.C.

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IN RE: HEARING ON TECHNOLOGICAL ALTERATIONS
TO MOTION PICTURES
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Washington, D.C.

Thursday, September 8, 1988

The hearing in the above-captioned matter was held, pursuant to notice, at the United States Copyright Office, Library of Congress, James Madison Memorial Building, Washington, D.C.

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PANEL MEMBERS PRESENT:
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Ralph Oman, Register of Copyrights
Dorothy Schrader, General Counsel
William Patry, Policy Planning Advisor to the Register of Copyrights
Eric Schwartz, Policy Planning Advisor to the Register of Copyrights
Lewis Flacks, Policy Planning Advisor to the Register of Copyrights

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WITNESSES:
- - - - -

Colorization Panel:

Joseph Adelman (Color Systems Technology)
Bernard Weitzman (American Film Technology)
Robert Word (Quintex Corporation)

Roger Mayer (Turner Entertainment Company)
Arnold Lutzker, Esq. (Directors Guild of America)
Joshua Sapan (American Movie Classics Channel)

Preservation Panel:

George Stevens, Jr. (American Film Institute)
John Belton (Society for Cinema Studies)

Peter Nolan (Walt Disney Company)

Video Retailers Panel:

Vans Stevenson (Erol's, Inc.)
Burton Wides, Esq. (Video Software Dealers Association)

Academic Panel:

Professor Peter Jaszi (American University)
Dr. Thomas Dreier and Silke von Lewinski (Max-Planck Institute)

MR. OMAN: Good morning. Welcome to the Copyright Office's hearing on the new technologies used by the motion picture and television industries.

At this hearing, we will attempt to gather information for the Copyright Office study, which Chairman Kastenmeier and his House Judiciary Subcommittee had requested us to do several months ago.

We will complete our study early in 1989, as requested by Chairman Kastenmeier, and we will print the transcript of today's hearing as well as the written statements as part of the study in an appendix. Both will be available for a modest stipend in this age of "pay-as-as-you-go."

As important as today's hearing is, it is only a small part of a much larger drama. We have already had extensive discussions with many of the men and women involved in these complex technologies.

I should mention the technologies--for the people in the audience--the technologies are colorization, lexiconning and panning and scanning; and I should further mention that lexiconning is the term of art used in the industry for either stretching out, or compressing the original length of a motion picture.

Two members of my staff, several weeks ago, spent some time in Los Angeles, gathering first-hand knowledge of how Hollywood professionals put these new technologies to use.

I want to thank all of the people they have been talking to. I want to thank all our witnesses today, and I want to thank all of those other people in the motion picture industry and television industry and the video industry who have already given us so much of their time.

For those parties still wishing to add their voices to our study, I will hold the record open until September 22 for any written statements.

Before I describe the purpose and goals of today's hearing and our study, let me briefly summarize the Copyright Office's actions to date on the issue of colorization.

Once and for all I want to clear up a misconception that many people have about the decision I made recently on colorization. In June of '87 I issued the final decision on the registrability of colorized motion pictures. At that time I said that if a colorizer adds more than a trivial amount of new human authorship by adding color to a black and white work, then the Copyright Office would issue a registration for copyright for the additional authorship. The registration covers only the new coloring that has been added. It does not expand or detract from any copyright in the original black and white film. It does not take anything out of the public domain. We based this decision on over 100 years of registering works for copyright, applying the law as defined by Congress and the courts. That law does not take aesthetic value into account.

In no way did I "endorse" the practice of colorizing black and white motion pictures. The decision merely acknowledged that in some cases, not in all cases, but in some cases, there is sufficient human authorship to qualify for copyright registration.

In these cases, the practice of colorizing a work originally made in black and white is a creation of a derivative work under the copyright law; and like all derivative works, it is done with permission of the original

copyright holder; or in the case of public domain works, it is done simply because the law and Congress allow it.

It would take a change in copyright law to prohibit the practice of colorization, and that is Congress' decision to make, not the Copyright Office's.

That brings us to the subject of today's hearing and to our study. Congress can if it wishes simply allow the existing practices, including our registration decision, to continue. It can require some form of consumer protection such as labeling. It can require some restrictions on the uses of these technologies; or, finally, it can call for the outright ban on some or all of these practices, at least prospectively.

Chairman Kastenmeier has to decide if we need new legislation. To help him decide, he wants detailed explanations of the current practices in the industry.

It is a battle royal that pits one side against the other, between those who see the creation of a film as the creation of an immutable work of art, and those, on the other hand, who see a film as a simple commercial undertaking, and colorization, lexiconning, and panning and scanning as only a way to create new and lucrative outlets for these works.

In today's hearing we will look at how these technologies are used. We will ask why the industries find them commercially necessary, what are the alternatives, what objections are made to the uses of these technologies and by whom, and what aesthetic and commercial consequences result from the use of these technologies.

These are some of the questions we need answers to. We will seek the answers today in the context of the existing copyright law, including the issue of moral rights in the United States and in other countries.

We will also look at the current contractual and collective bargaining agreements that govern these new technologies.

Finally, we will look at what consumer protection, if any, Congress should look at--like the labeling requirements--that Congress implemented this summer as part of the film preservation bill.

We also will look at issues connected with what I call the protection of our cultural heritage. Are colorized black and white films still shown in public theaters, on TV, and on video tape in their original condition?

I think we can agree that all of us want to make sure that we preserve these treasures of our film industry, and make sure they remain a part of our culture.

The question arises, what role should the government take in film preservation? Even more difficult, what role should it take in making films accessible to the public where there isn't an economically viable market for them?

Finally, we will provide Congress with recommendations for legislative changes, if we believe that they are necessary; but it is more important for us to offer Congress a range of options, rather than decide if these changes are needed.

Let me now introduce my panel for today's hearing. These individuals will also be my key contributors in the preparation of the copyright study.

I am joined by three lawyers from my senior staff, William Patry on my immediate right, Eric Schwartz on my far right, and Lewis Flacks on my far left; and on my immediate left is Dorothy Schrader, the General Counsel of the Copyright Office.

At this time, I would like to call our first panel of witnesses. I see they are already in place and eager to go. They represent three companies, and to my knowledge they are the only companies in the world that colorize motion pictures.

I will ask you to introduce yourselves, and I will note the presence of the former General Counsel of the Copyright Office, a gentleman who at our last hearing was described as the world's finest lawyer, Jon Baumgarten; and he is here to accompany Mr. Adelman.

Gentlemen, will you please introduce yourselves and decide who is going to go first.

MR. WEITZMAN: My name is Bernard Weitzman. I am with American Film Technology. The witness list mentions George Jenson. He is not here. I am here, and I will speak on behalf of American Film Technologies and the industry in general.

MR. WORD: My name is Rob Word, and I am with Quintex Entertainment, formerly Hal Roach Studios, and I am senior vice president of the company, and proud to represent us here today to talk about colorization.

MR. ADELMAN: My name is Joe Adelman. I am senior vice president of Color Systems Technology. I am accompanied today by our Washington attorney, Jon Baumgarten, who has already been identified.

We would like to start off our panel, if we may, by a ten-minute video presentation, half of which is devoted to an explanation on the colorization process, particularly Color Systems Technology, but in many respects applicable to all the other coloring companies; how the process works, how it starts, what it does, what it does not do, people involved, their skills, and their tasks.

That would be followed by a brief demonstration of colorized excerpts, which our company did for several motion pictures owned by the Turner Entertainment Company.

Briefly after that presentation, I have several still shots of pictures in production.

Immediately subsequent to that, Mr. Word will be presenting just a few minutes of excerpts colored by Colorization for a TV series, which is also in the marketplace for colorized products.

(Thereupon, a video was shown).

MR. OMAN: With all due respect, Mr. Adelman, with due deference to the importance of this hearing, I think many in the audience, including many of the panel here, would prefer to sit around and watch the movies than hear the testimony today.

MR. ADELMAN: We can arrange that. I would probably enjoy it more.

I am going to turn the microphone over first to Mr. Rob Word of Colorization, Inc., and then Mr. Weitzman; and I will make some concluding remarks, and perhaps also Mr. Baumgarten.

MR. WORD: I should first mention that what we just saw in the second clip was, as you could see, a television series. This is the first

situation comedy that has been colorized, and we are excited about it, because what it has done is take a black and white show that obviously still has some humor content to it that has been languishing on the shelves and it always seems a shame when we are dealing with the old black and white movies, as the old black and white TV series, it should just be limited to memories or to nostalgia buffs. And by creating the new colors for this series, we will create a new generation of viewers to appreciate this show. Much as new generations today are discovering the classic films. I noticed the clip of Cyrano de Bergerac with Jose Ferrer--it's a forgotten film--done in 1950 that won an academy award for Best Actor for Jose Ferrer. To see it in color on TV just means that many, many people are now going to get a chance to see that, because really there was nothing to entice them to even sample the show.

As you may or may not be aware, of the 88 million households in the country, 96 percent of them have at least one color TV set. So, that really limits the appeal of black and white, because people do prefer to watch color at home.

Television is a commercial enterprise, and you know commercials have always been a part of free television; and while television in the '50s and early up into the mid to late '60s was in black and white, we are now seeing the majority of all shows being in color.

In fact, in the TV Guide of last month, August 20th, just a sampling of all the programs in that one week of television, 95 percent of the shows were in color; and it's not that there are no black and white programs available. It's just that the stations refuse to buy them; because as I

said, it's a commercial enterprise. They are very competitive. They have their viewers, and they want to have as many of them as they can. They just don't get them in black and white.

So, the new technology of being able to adapt the classic feature films, now dipping into the classic television series, is going to really make available these older films and TV shows, which we think is very exciting.

The television series, of course -- the ratio for the TV series was designed to fit the size of the TV screen; and all the older films that were originally filmed in black and white up until about 1953, were all in the same ratio or similar to what a TV screen is.

To compete with the TV explosion in the mid and early '50s, motion picture studios had to come up with different things like 3-D and wide screen; and wide screen, as you know, does not fit the TV screen. You see about a half to two thirds of the original image. That's why so often when you are watching a movie made after 1953, you see abrupt pans or scans; and that's a technology that was done originally with little care to adapt these films to television.

Now, of course, technology has improved so much, that the producers and the directors get involved; because when they originally were making these films, television was not there, and there was no need for them to even consider what was needed to make these films work on television. Now they get involved so that when you are watching a movie, you don't see two noses talking because the framing and the composition is different. They will help to adapt to that, which is merely the selection of what is

important to the drama, to the comedy, to the actual action that is going on in the story of the movie so that's what is seen. It's a selective process. It's another step of editing that didn't exist before television, because there was no need for it. It didn't exist before wide screen.

Cyrano and the MGM classics and Warner Brother Films that were colorized that we have seen in these clips were done prior to the wide screen. So, there is no need for them to be panned and scanned; but because they are in black and white, there is little demand for them on television; and by colorizing them, it's helping to meet the needs of the modern technology, which is television.

Television is how the majority of people are entertained. They see their films, whether they rent them or whether they watch them over free TV. They view them on television.

So, instead of watching the classic old films as they were originally intended on 50 or 75 foot screens in a dark theater with no interruptions, where all the nuances of the black and white and the grays would come across, they now watch them on a very small--although it's getting larger from a 19 inch which used to be standard, now the standard is about 25 inch--but still it's quite a bit different from watching a movie on television, than it is to experience it on a large screen. The audience's preference, obviously, is for color on television, because they are buying the color TV sets. The networks--it's been years since they have produced anything in black and white--they are trying to get a larger audience.

When we are taping the films in our company and transferring them to video tape, we not only are preserving a copy of that on video tape, but we

are often times creating a better copy than has been in existence in television syndication in the previous years.

In the '50s and '60s, and actually through the '70s movies and the television series were distributed and syndicated on 16 millimeter prints; and those would be shipped around from station to station, and mutilated. Cue dots, which are a warning a commercial is coming up, would be punched into the film, and as a warning to the switcher and the director of the TV station when it was time to place in the commercial. These films would be scratched and battered, and it was a disservice to the wonderful work that had been done on these films initially.

Once they are transferred to video tape, there are processes in which we are proud to be taking a lot of scratches out, enhancing the audio, and making them look better. Those are things that must be done before the colorization process starts; because if it's not done then, all of those scratches and the cue dots and mutilated scenes and pieces that are missing, well those same flaws will be inherent in the color. So, there is quite a bit of restoration that goes on before the actual colorization begins.

I know in one of the films that we colorized, "Something to Sing About" with James Cagney, we looked for prints; and it was a musical, of course, and Jimmy Cagney, being a hoofer, it was ideal for color. It was one of those lost movies that even film buffs never really saw.

So, we found a print of it, but it was a reissue called "The Battling Hoofer," and about ten minutes had been taken out of it. So, we had to continue our search for another print, and we found another print that was the original length, or a little bit longer; but it had scratches, and it

was unsuitable for colorization. Finally, we located five different prints and assembled a complete version of this, restored it in black and white before the art directors began to look at it with an eye for transferring the black and white to color, and creating our color version of "Something to Sing About."

Now, when that was completed, we had already been marketing the restored black and white version in the video market. So, the black and white version was available in home video, even though as you will hear later I am sure from the video store representatives, there is really little demand from the consumer for black and white.

We did it because we felt it was a service to the public; and when the color came on the market, obviously that's what people were choosing, and that's the one that has been available on television; and people have had a chance to see it now, just as they will have a chance to see Cyrano de Bergerac and Jose Ferrer's wonderful performance.

It's just the technology that is making it work. I know in Clint Eastwood's movie "The Bird," he has taken Charlie Parker's single composition where Charlie Parker is the only person playing, and to make it acceptable for today's audience in his new movie, he hired other artists, other instrumentalists to record on top of Charlie Parker's original piece; and while he didn't destroy the original, what he did was expand on that original with new artists to contemporize sound, to make it available and entertaining for a new generation.

Now, I am not a big fan of Charlie Parker, but I am going to see that movie; and I think the music would probably appeal to the people who think that Charlie Parker perhaps a little too austere for them.

That's what we are trying to do, too, is to create something new that will appeal to generations not just today, but forever.

As long as there is the television medium of distribution, we feel that these films should be seen; and rather than have them sit on the shelf as "McHale's Navy" has been doing, we are looking into rediscovering not just classic movies, but classic TV shows; and continuing to keep them before the viewing public, which is what they were made for originally, for pure entertainment purposes. We feel they should be still entertaining people. There is no reason to hide them away.

MR. OMAN: Thank you very much. We have two other members of the panel that have something further to add.

Mr. Weitzman will go first.

MR. WEITZMAN: My name is Bernie Weitzman. I am the newest kid on the block. American Film Technologies is the third company that's entered into colorization. I am probably the oldest gentleman in this group. I have been around the industry since 1948.

I have just for a moment--

MR. OMAN: When you say the industry, you mean the motion picture industry?

MR. WEITZMAN: Motion picture and television industry. Just to give you a little background--because when we speak, I think it's important for

you to know where we come from. I wasn't born to color; I was born into the industry, and color came about through evolution.

My first major experience in the broadcasting business was I worked on the original "I Love Lucy," which, by the way, was in black and white; and I think that if you saw the show as being filmed as I did from firsthand knowledge, you would cry to have that show now done in color; and all the directors that were involved with it I think would agree with me.

There are a number of shows like that Rob pointed out, that really need this kind of input to help to make it more outstanding, to make the public be aware of what they can see; but the single most important point is, we are not touching the black and white version. We are giving the public an option to see what it really looked like on a sound stage when it was shot in black and white, but really in color, and what it would look like in color after it was recreated.

So, I think that's a marvelous opportunity. Plus the fact that our technology, my company in particular--I can speak for only my company--that I think we have done an incredible job of improving the technology to the extent that if everybody would stop talking about colorization and coloring, and just look at the picture for the quality it represented--I don't believe if you ever took a poll in statistics, that the public would vote yeah or nay because it was in color, because the public would think that that picture was originally shot in color. There would never be any doubt that the picture was shot in color, even though the picture was originally shot in black and white. That's the advancement we are giving. Plus the fact, you always have the right to see it in black and white without touching it.

Our biggest customer is Turner Entertainment, the same as Joe. Interestingly enough, our second major customer is Republic Pictures Corporation. The first picture that we did for them was a great classic black and white film called "The Bells of St. Marys," which starred Bing Crosby and Ingrid Bergman.

I wish I would have brought some of the film here; but I figured we had so limited time, I just didn't want to go on with so much film. I wanted to talk about firsthand knowledge. This went on the air in November, December of 1987. This was our first effort. That particular picture for Republic got a nine--was ninth in the Neilsen ratings--for a picture that was originally done in 1945. It was a single picture, no publicity, no promotion. It just went out, and did a spectacular job because it WAS IN COLOR; and the picture had been around for 43 years in black and white, and never attained such a rating as it did when it was shown in color for the first time.

The people in Republic were so impressed by that,--they only had two pictures with us originally--that they picked up an additional eight pictures. Now they want to go for 25 more, because the receptiveness on the color basis was so great as far as the public is concerned, that they see a great future in it.

They have also told me, as a matter of fact, that the video cassette version of this picture in color outsold the black and white version ten to one.

One of the simplest little studies that I can give you in all the complicated reports and Neilsens and statistics and so forth is, there was a

very impressive study done in Los Angeles not too long ago by one of the Los Angeles stations, and they were interviewing the public at large and getting all kinds of comments. Finally they went to one little seven year old kid and they said, "Why do you like color over black and white. What is your feeling about that." The kid says, "It looks better." That was the whole analysis. That's what it is all about. It looks better. It feels better. The public is more attracted to it. It is something I believe will show up in every statistic that will be taken.

In addition, one of our major customers is Disney. Now, believe it or not, we are doing ten hours of Disney cartoons that Walt Disney originally put together in 1933; and they were black and white, and we are coloring them now. I guarantee if you look at those color cartoons, you couldn't pick out the cartoons of today versus the cartoons of 1933. They are that good; and Disney is confirming how good they are, because they are paying us a lot of money to do them all. They are very happy with them; and you won't probably know this but they are very difficult. They are perfectionists. They want the best. They wouldn't endanger their reputation and quality on doing something on a second-rate basis.

I think that's true of Turner. It's true of Fox. It's true of every major organization today, because we are selling to the public. The public has a right to turn that knob off or on; and if it isn't good, the public isn't going to pay for it.

So, we have tried to meet those public standards by the quality and the effort, and we believe our process is extremely creative. We have 162 people employed in our plant in San Diego, and these people are of all ages,

although predominantly under 35 because most of them have been recent college graduates from San Diego State, University of San Diego, California State. They are very artistic and very creative; and they are not only able to create, but they also are able to operate the computer. So, you have to have a combination of the two talents, and these kids are astounding because they become design artists, they become creative artists. They now put our color palette, believe it or not, is capable--everybody thinks we can do everything, but we can't--is capable of doing 16 million 800 thousand different color combinations.

People say, "My God, give us that off blue." We can't do everything perfectly; but the technology and the state of the art that we are accomplishing, in this business has become so good that I would challenge anyone to take a look at what we can do today; and we are improving it every day. Some of the films you have seen here today are some of the early films. Some of the arguments people have had is they look "pasty" and they look at this and they look at that. The other thing is the customer also has a right to select what they want.

In "The Bells of St. Mary," the picture I was describing earlier, the client wanted it to be subdued. He didn't want the colors to jump out and hit you. He wanted it to be very soft and quiet, and commensurate with the picture we were showing, which was a religious type of picture. That's what we try to do.

We would work with the directors if they were alive and willing to work with us. We welcome them.

We were able to find an art director who worked on "The Bells of St. Marys," and we worked with him to come up with the absolute creative look in its best form.

So, we go out of our way to try to research, work with people who may have been connected with the picture. We work with the academy. We work with the public. We try to work with anyone that can help to make the picture look good with our technology, and we try to hire the best people there are, the most creative people available, and come up with a product that the public will be proud of, and never destroy the original work that will always be available to the public.

MR. OMAN: Thank you very much.

Would you want to add something else, Mr. Adelman?

MR. ADELMAN: Yes, if I may.

I would like to request my full statement be made a part of the record, and I would just like to highlight a couple of areas neither Mr. Word nor Mr. Weitzman has addressed. Although Mr. Weitzman was very eloquent, this is his first time in front of a federal agency; it is my third. I think I am getting weary of it even though Washington weather is very nice this week.

Our company, Color System Technologies, colorized approximately 50 motion pictures. Admittedly some of the earlier ones, the ones that did, as Mr. Weitzman mentioned, create and cause some of the harsh criticism as to quality--and were not as good as what we produce today. They are no different than any other forms of early technology; we've improved considerably.

We have invested 55 million dollars in capital. We have over 200 employees, and we are getting a little tired of being considered and charged with something that is in the nature of some criminal abomination in terms of our activity.

We don't think we are doing anymore than is consistent with the constitutional premise behind the copyright law. Innovative dissemination by new means for a new generation of the public, I think it is a premise behind--Article 1 of the Constitution.

In layman's terms, we have not destroyed anything. The original negative is there in black and white. The prints are there in black and white; and although we could not bring today a film in black and white, we did show you that if you turn off the color button, the original video tape is black and white.

We have made our black and white prints of colorized pictures available on request, gratis, to universities, museums, to other such archival screenings.

They are available in their black and white form for those few limited commercial areas that may want to license them, whether it's cable, a couple or three theatrical venues still left in this country, although very few. But, as Mr. Word said, what we are doing is supplying the public with enjoyable entertainment in the form in which the modern generation is accustomed to seeing it.

We have spent a lot of money. We are taking risks. We are not apologetic. We don't ask for guarantees. We ask that our works--derivative

works in the terminology of the copyright law--be allowed the freedom of the market place as any other creative work.

I want to touch on two matters, and then I will conclude my remarks.

The Copyright Office asked for some information and input as to practices in foreign countries, or perception by foreign countries. There is an argument going on in one foreign country. In terms of my experience--extensive experience over the past year in showing our product--there is a decided interest by major western European countries, and eastern European countries, including East Germany and the Soviet Union, in having our process, or the colorization process in general, implemented to convert their black and white films into a modern medium of exhibition, so their audiences appreciate and see some of their marvelous works.

I've had French, British, Russian, Italian people come up to me in my business in Europe and ask me about the cost: "I have a film made in 1930, and nobody is watching it. Can I have it done?" We've had inquiries from the BBC, the leading television of Great Britain. Pictures have been licensed to the BBC in colorized form. Pictures have been licensed to a French network in colorized form, and they are looking also for us to convert their films into the modern medium.

There is a different law in France and Germany as we are aware, "moral rights," and they will have to contend with what is required under their laws.

We are subject, as one of the other witnesses will talk about today, to a lawsuit currently in Paris. Not we ourselves, but we colorized a picture that was licensed by a French network, and the heirs of John Huston

brought an action in concert with the French writers and directors union. I think we will prevail at the trial that is due later this month.

Now, I would like to address the issue of contractual practices in our industry, which is what I think basically underlies a lot of charges we are being subjected to.

There are extensive collective bargaining and individual negotiations in the motion picture industry. I, at one time during my career, headed up the Association of Motion Pictures Television Producers, and at various other times was a senior executive at both United Artists and of Paramount and was fairly active in that arena, in addition to others.

It would be mind boggling to describe the esoteric areas of collective bargaining agreements in the motion picture industry, far beyond just minimum wages and working conditions.

The Directors Guild of America, in particular, has for years and years demanded, negotiated, and obtained what they call "creative rights," in their collective bargaining agreements. They cover the rights of directors to be consulted, the rights of directors to do certain acts without interference, and limitations on what the studios can do. These negotiations have been long, and they have been successful for the Director's Guild over the years. They have, interestingly enough, antagonized other unions in terms of their demands. The Director's Guild and the Writer's Guild have long battled ferociously as to screen credits, who can say "it's a so and so's film, "and who can't. And the industry at some times has been caught in the middle between the two guilds battling for that kind of recognition.

In the recent Writer's Guild negotiations which ended after a long, long strike, the Writer's Guild asked for some protection from the producers and additional creative rights. The Director's Guild reared up and said, "You can't have them. Those are ours," and the producers were influenced not to grant those additional rights.

That's okay. That's the marketplace for collective bargaining and negotiations, and there are also extensive and prolonged heavy individual negotiations with lawyers and agents representing directors, writers, and actors.

We believe that's really where this argument is lies, and that's in the realm of the private sector negotiation. We don't believe that there is any need whatsoever for any federal legislation in this area.

The National Film Preservation Board, which you previously mentioned to us is also, in principle, unacceptable in terms of getting the Government involved in any form in determining what is value, whether it's motion pictures, books, paintings, what have you.

This is not where the Government belongs. It's close to censorship, even though it's supposed to identify our classics.

Can we live with the bill as it is? Yes, and we will have to if it's enacted, and abide by the labeling provisions; but we think it's a dangerous precedent.

As I said, underlying this, in my opinion, is an attempt by one group in particular, the Director's Guild, to achieve by legislation what they should achieve by negotiation, and may be what they have not today achieved by negotiation. What they are really looking for, in our opinion--my

opinion--is not just to restrict or prohibit colorization. I think they are looking for the introduction piecemeal of moral rights in our country. And that's fine; but I think they should come out and say so, and let moral rights be introduced and debated in the halls of Congress for each and every artist, not just directors or principal screenwriters. And if that's the way our legislators wants to go, fine. But I don't think we should single out areas which are really insignificant to an overall view of moral rights, and they certainly don't belong to just directors.

I recall the Register himself making some comment at our last meeting with Representative Kastenmeier, pointing out very clearly that the proposed Gephardt bill was quite exclusive, and ignored the collaborative efforts of many other talents involved in film and television production; actors and cinematographers, other writers, composers, and set designers. And I think that was accurately said; it is a collaborative effort.

I think moral rights of other countries recognize more than just directors and writers. But that's where I think all this stems from; I think that's where it belongs. I would like to come back to Washington as a nonparticipant the next time. I thank you very much.

MR. OMAN: Thank you very much, Mr. Adelman. I would like to clarify one point that you made. I contend that Congress has in fact concluded that United States law does now recognize moral rights protection for creators, at least sufficiently to satisfy the Berne Convention.

What you are talking about is a higher level of moral rights protection as in France and Germany.

MR. ADELMAN: Absolutely.

MR. OMAN: I wanted to clarify that point.

You mentioned--the panel mentioned several other activities in the colorization area. In addition to motion pictures, we saw McHale's Navy.

Are there other efforts to revive some of the great television classics from the '50s--"Playhouse 98" or "Omnibus?" We are very honored today to have in the audience Bob Saudak, who was the producer of the Omnibus series back in the '50s. He is now the Head of Motion Picture Broadcasting, and Recorded Sound Division of the Library of Congress.

I am wondering really if you are only focusing on situation comedies series type.

MR. WEITZMAN: Can I address myself to that? In fact, we just completed a segment of World War II footage "War and Remembrance," a mini series by ABC that is going to start this November. They did a magnificent job, and there probably never will be a series of that kind ever produced again. It cost over 100 million dollars, and we did some of the footage for them that they couldn't possibly shoot today. We took the old World War II footage, and rematched it to what they shot originally today.

I think that is another thing we can do, is bring back programs that you are talking about, "Omnibus and great programs of that kind. The only problem I can see present in that area is A, the quality of the elements themselves that we have to work with to restore the color; and two, cost factor, because it is a very costly process that we are doing here in the coloring business.

If costs can be reduced, I think we can also add that great service to the public for posterity's sake.

In addition, we are also working on restoration of colored films that are losing color because of the chemical process. Some of the great films of all time that were originally shot in color, are fading because of the chemical deterioration; and we can bring that color back to where it was originally, almost to the perfection of the original technicolor shooting.

MR. OMAN: And you will do that even without the benefit of copyright protection?

MR. WEITZMAN: Yes. Well, it's already copyrighted material. So, all we are doing is bringing it back. As you said earlier, it doesn't change the copyright position.

MR. OMAN: One question, Mr. Adelman, before turning to the other members of the panel. You mentioned talking to people in Europe. Who are you talking to? Are you talking to directors? Are you talking to broadcasters? Are you talking to people who own the films?

MR. ADELMAN: We are talking mainly to broadcasters. We are talking to people who own films, and I, myself, have, indeed, had a couple of conversations with directors. I don't think I would like to name their names. They were private conversations. One was from the UK, in particular, a well-known director who did a picture in the '30s and would love to see it on screen again.

MR. WEITZMAN: We are talking to them also, foreign countries.

MR. OMAN: Thank you very much.

Let me now turn to Mr. Patry.

MR. PATRY: Mr. Word, you mentioned the Charlie Parker film, which I have been following as well.

One fact that hasn't been reported in the newspapers is whether Mr. Eastwood got Mr. Parker's heirs' permission to rescore his music.

Do you know whether that is, in fact, the case?

MR. WORD: Yes. I believe they received the recording that they have enhanced and added arrangements, from his widow in France. So, she worked with Eastwood, at least in supplying that.

MR. PATRY: Okay. That's rather a different fact than some of the facts that are involved here. At least with respect to the directors and cinematographers and others that might be the distinguishing facts; but I think most people, even most directors, would agree that you currently have the right to colorize motion pictures without the directors consent, absent any sort of contractual restrictions that people like Woody Allen might have.

Assuming that you do have that clear right, should that really be the end of the matter though? Leaving aside that you have that legal right, should you nevertheless go ahead and do it, notwithstanding that a substantial part of the public and maybe a substantial number of seven year olds like it as well, if the director and the actors and other creative people who are involved in it object to it, even find it morally repugnant? Should you go ahead and do it anyway notwithstanding that you have the legal right to do it?

MR. WORD: Well, the films we are doing, obviously, we do have the legal right to do it; and in television, we have discussed--Mr. Adelman has discussed how film is a collaborative art. In television especially, it's certainly not a director's medium. It's a producer's medium. The director

essentially has no say in the packaging and the production. He is a person for hire who comes in on a weekly basis, brought in by the producers, and it's the producers who are the creative force behind all TV shows.

MR. PATRY: You would agree though that certainly a director has some creative impact in the movie?

MR. WORD: In a movie the director is the boss, in theatrical films. On television it's a different medium. It's a producers' medium.

MR. PATRY: Leave television out of it. My question is really not who has the overall final authority. My question is, conceding, as you really have to, that directors and cinematographers and set costume designers do have substantial input--my question is, leaving aside that you have the legal right to do it, should you go ahead and exercise that right when those individuals object to it?

MR. WORD: It's not question I can answer. We are doing what is legally proper in making it available.

Let's look at it a different way. Think about the directors and the cinematographers and the writers who created these films, and who are no longer around to have any input at all. Is it right to have these films be forgotten for future generations, and just remain to be seen by no one because they are not available in color; and the hard work and creativity that went into creating a story, and the mood and creativity that went into creating a story, and the mood and the message of these films just be totally forgotten, and not available to future generations?

MR. PATRY: That's a different question.

My question is, when the people are there and the film is not forgotten--you can't say "Casablanca" is forgotten. You can't say "The Maltese Falcon" is forgotten. You can't say that "Citizen Kane" is forgotten. When those people are around and they object, your position is you have a legal right to do it; and notwithstanding that, the people involved object to it on moral grounds, it's okay to go ahead anyway?

MR. WORD: I think it's okay to go ahead anyway, yes; because if you will look at the people's feeling of when they made these movies, their appreciation, their compassion for them is as of a feature film, as something to be shown in the theaters. We are certainly not talking about destroying the integrity and the original intent of their film. We are talking about a new medium. Television is no way close to what a motion picture experience is; and so for them to object to adding elements that are different for a theatrical exhibition, I certainly understand that; but for making something available on a color television monitor, which is a new medium, something that has not very much relationship to the motion picture experience, it's creating something that is totally new and accessible.

So, we are not changing at all their original intention of a theatrical film. It's different. Television is not movies. Theatrical is a different experience; and so when they object to that, I certainly concur; but for a television monitor to create something exciting and new and accessible for TV--really we are talking apples and oranges. Television is not and never has been the same as a theatrical motion picture. It's different.

MR. PATRY: The comparison is really not theatrical to television. The comparison is black and white on television versus colorized on television.

MR. WORD: That's different also.

MR. PATRY: You are willing--at least I believe Mr. Adelman's company is--to give directors the opportunity to consult and provide input on color selection. I believe there was a letter that Mr. Adelman sent to Elliot Silverstein, the Executive Director of the Director's Guild, to that effect.

My understanding is though, that you are not willing to give directors the final say about, certainly colorization, or, certainly, all the other creative decisions; is that correct?

MR. ADELMAN: That is absolutely correct, and that is totally consistent with the traditional custom and usage in the motion picture industry and other areas aside from colorization. Unless a director owns a picture or is a co-owner, or has what is called the "final cut." And only major directors at certain studios can negotiate for that. He customarily has the right to several cuts, which means edited versions of the picture prior to release. Thereafter, it's the production company, the studio, or copyright owner, if you will, who has the final say even today.

MR. PATRY: You took the position in your testimony and your written statement, that the director's problems in this area should be resolved in collective bargaining agreement, or in labor context.

Isn't that really illusory, because if, as I believe the case is, the producers will not give the directors final say, you won't give them final say either? Isn't that illusory to say then, "you can rely on collective

bargaining," because it's something that you are never going to bargain away?

MR. ADELMAN: They often obtained, "final say" in individual bargaining depending on their talent and strength. But if they can't obtain it, so what? It's no business for Congress to legislate their rights. They work as employees. They get paid stupendous sums for their work. It's a matter of strength of bargaining.

MR. PATRY: I wasn't talking about legislation and agree it's a matter of private contractual bargaining. Woody Allen has gotten it.

MR. ADELMAN: That's right.

MR. PATRY: And maybe other people can get it too. But in terms of basic agreement, collective bargaining, underscoring collective, not individual. Under collective bargaining it's a right, in fact, that producers are not going to give.

MR. ADELMAN: That's true. Collective bargaining deals with minimum rights of every single person who is employed in that capacity; and just as the minimum director gets maybe \$75,000 to direct a job at scale, and a major director gets a million dollars, the collective bargaining deals only with the minimum.

MR. PATRY: So, we can leave aside the idea of collective bargaining. If the directors are going to get what they want, they have to have the strength to get it through individual contract bargaining, or are going to have--

MR. ADELMAN: That doesn't mean they may not get some of it. They have achieved over the years certain rights to control editing for pictures

cut for television, network television. It's a gradual process. They may achieve certain other rights.

In this year's collective bargaining agreement, they achieved the right which we had offered but they achieved it prospectively, to be consulted on colorization, panning and scanning, and time compression.

MR. PATRY: Right, and my question was based on the right of consultation; that that right of consultation is not going to be converted into a final say, at least in collective bargaining, although maybe through individual bargaining.

Is that your understanding?

MR. ADELMAN: I can't predict what may happen in terms of future negotiations.

MR. PATRY: I don't have any more questions.

Your written statement by the way was most responsive and helpful.

MR. ADELMAN: Thank you.

MR. OMAN: Thank you, Mr. Patry. Mr. Schwartz.

MR. SCHWARTZ: Mr. Weitzman made mention of the ability to use this computer colorization process to restore works, but you are just talking about video tapes that you can restore for television and video markets, not film prints for theatrical markets; right?

MR. WEITZMAN: We are working on a method now of being able to restore color, and put back into theatrical motion pictures, film that will be capable of projecting back on a motion picture screen a colored version of a black and white film through our current technology.

We will be able to do that, and we think there are certain pictures that will be sensational after they are colored to be put back into the theater and in color for the public.

MR. SCHWARTZ: If you have to do that process now to create a colorized work, you start with a black and white print?

MR. WEITZMAN: Yes.

MR. SCHWARTZ: Would you also have to clean up the black and white print in the beginning of this new process?

MR. WEITZMAN: Yes. I think that is a service we all give, that we make prints look better for black and white purposes as well as color. So when you show them either way, they look far better after we add our process to it than they did originally.

MR. SCHWARTZ: Because even under that process, you would have to remove the images off of the print to make them electronic images first?

MR. WEITZMAN: We are not taking the images--

MR. SCHWARTZ: The images off, no. But I mean you are using the images--

MR. WEITZMAN: We're just transferring it to the individual video tape. The original images always stay where they are.

MR. SCHWARTZ: Right, but you have to use that to start with--

MR. WEITZMAN: The public I think is confused on this. They think we are really taking that film and doing funny things with it.

We are not. We are not touching it at all. We are just making a copy for our purposes to color.

MR. SCHWARTZ: Do any of the other panel members wish to respond?

(No response).

MR. SCHWARTZ: Is it true that the color contract has always been such that when you turn down the color knobs, as in the demonstration, you always have the same black and white images? Early on in the process, was it true that you had to wash out or change the gray scale on the prints in order to colorize them?

MR. WEITZMAN: Not in our process we don't.

MR. SCHWARTZ: Is that true for all three of you?

MR. ADELMAN: I would like to address that.

There seems to be some miscommunication, in which apparently Congress brought into the regulation on deposit of copies that we do something to tone down the gray levels or the contrast in preparing our video tapes for colorization. That is not the case at all. We maintain the best gray scale rendition possible.

MR. ADELMAN: There is no attempt made to increase or decrease. It is at the same contrast as the film.

MR. SCHWARTZ: Was that true early on in the process as well?

MR. ADELMAN: Absolutely.

MR. WEITZMAN: I want to take it back from you. Please. In fact, if the gray scale isn't there, some pictures we just can't do. It has to be there to start with. We don't add or subtract to it. It has to be there, or we can't work with it in any other way.

We enhance the quality of the film itself by taking out the glitches, and the scratches, and the changeover reel markers. All those things make

it a better looking thing, but we can't remake the picture if it is bad to start with.

MR. WORD: I think there has been some confusion on this point; but when films were seen on television as 16 millimeter prints in syndication which was the standard. Those films were copies of copies of copies; and quite often the gray scale almost disappeared, and they were black and smudgy. What we are doing is restoring them to their original subtle grays and blacks before the colorization process begins, so that they are preserved in black and white. A black and white version is there before colorizing begins. We do not tamper adversely with the films.

MR. WEITZMAN: We take the bad rap for bad elements; but when you see the elements like Turner has, the quality of the elements that they have and what we can do with that, you see the perfection of color because the quality is there to start with.

MR. SCHWARTZ: I just had one last question for Mr. Adelman.

You mentioned that Color Systems Technology makes available 35 millimeter and 16 millimeter prints to the public in some cases.

First of all I wonder if you could explain why you do that. I think you said you do not charge for that; and also, are you only talking about prints that you are the copyright owners of, or any of the films that you colorize?

MR. ADELMAN: No. We only deal with what we own. In addition to colorizing for our customers, we do own our own films. We make them available. The reason I mentioned we make them available is that charges are made that what we are doing, in effect, is going to remove any

availability or opportunity for people to see the black and white--and over the past six months, on request. I have wanted people to know that we are on some campaign to withdraw black and white from the marketplace. We deliberately make them available. It doesn't affect our marketing. It makes people aware that the picture, and both forms are available.

MR. OMAN: I want to ask one brief question in response to one of the answers that I heard.

You made a very detailed explanation of the difficulty you had in finding the perfect print of the James Cagney film, and the great lengths you went to in getting that perfect print.

Did you make another perfect print that would be available for theatrical release as part of the colorization process; or did you piece it together, and leave it pieced together without making a perfect final print that could be then shown in the theater?

MR. WORD: We don't really deal in the prints. What we did was we located the prints, and then transferred it to video tape. It's through our video tape enhancement process we restore it.

So, we are not equipped or set up to work on films. It's a video tape process.

MR. OMAN: But were you provided with a perfect print?

MR. WORD: We have the black and white preserved on video tape, not on film.

MR. OMAN: Ms. Schrader.

MS. SCHRADER: Mr. Adelman, I believe you mentioned that you have

licensed one or more films for showing on BBC, and perhaps elsewhere in Europe.

Have those transmissions actually taken place? Have they been shown on television?

MR. ADELMAN: No, they haven't, and I should be more precise. Pictures we have colorized had been licensed. They had been licensed by Turner Entertainment Company one to the BBC which has not yet been shown, and has been some pressure exerted by British Directors Guild as an unofficial influence.

So, that's in suspense but has been licensed. I believe it's "The Charge of the Light Brigade," and similarly Turner has licensed the John Huston picture "Asphalt Jungle" to one of the French networks that is subject to a lawsuit right now.

I, myself, have had discussions with the BBC in terms of pictures in the film library's control, which I mentioned; and they are amenable to licensing. They have no policy there against not showing colorized films.

MS. SCHRADER: No policy? The BBC has not entered into at least an informal agreement with a group of directors, in Britain, headed by, I believe, Fred Ziniman, which would indicate that at least certain classics would not be shown?

MR. ADELMAN: Not to my knowledge, and I have met the head of programming there in May.

MS. SCHRADER: I have a question for any one of the panel.

Would you admit that colorizing at any time could be done so poorly

in quality, that a director--an eminent director of a well known film--could feel that his or her reputation had been injured by the colorizing process?

MR. WEITZMAN: Can I take a crack at that one?

MR. OMAN: Take the microphone.

MR. WEITZMAN: Some of my best friends are directors, and they object to anything if they think it's their work.

Addressing myself to the situation, I have asked one of my director friends, "How come you never object to a colored film that is broadcast in black and white over a television set when you only have a black and white set? How come you never say 'You cannot broadcast my colored film that I created in color in black and white.' Why isn't that an objection?" Never a peep out of anybody.

So, I say that some directors would object to anything. We have offered to work with them up and down the line.

Now, one of the things that we can't do with the director that Bill Patry brought up before, is give the director absolute final control. Some directors will never let a picture go. They will work on it interminably because they feel it could always be improved; and if anybody else touches it, it's bad.

Well, we can't survive, the company can't exist, we can't run a business if somebody says we are going to do it as long as we want to do it. We can never meet air dates. We can never meet budgets. We can never meet cost control. We can't do anything if the director has the absolute right to decide what's good or bad.

So, if the director says, "I don't like it because the way you are coloring it"; we say, "Come on in. Join us. Help us with it. You are welcome as long you play by certain rules; that you can't do it your way totally," because there are certain other elements other than creativity you have to control too. We would be out of business.

MR. OMAN: Does anyone want to take a crack at Ms. Schrader's question in terms of specifics?

MR. WEITZMAN: Did I answer it in part?

MS. SCHRADER: Yes.

MR. OMAN: In terms of whether or not there could be such a mutilation as to injure the reputation of the director.

MR. WORD: It seems like it is something that can't really happen, because the director's film is still preserved and available; and to put something in color is not going to ever destroy the story. All the colorizing is doing is continuing to keep that director's reputation alive. We had so many calls of "congratulations" and "thank yous" from people when we did "It's a Wonderful Life," which did a ten rating nationally. It sold over a quarter of a million home video cassettes in color. People were thanking us. Older people were saying, "My kids would have never seen that movie, and it's such a life affirming message that it has helped them in their life."

I certainly don't think that that kind of response for a classic film, that obviously could easily be forgotten if it remained in black and white--except for the film buffs and nostalgia buffs out there--is going to be heard.

It's enhanced that film by broadening the audience. It's brought that wonderful message to hundreds of thousands more people who will continue to do so.

MR. WEITZMAN: Just one more thing I would like to add.

If any of you ever have the opportunity to come to the plant and see the amount of research and time spent on trying to make every picture look wonderful, by the way, there are certain pictures we can't color and won't color, because we know we can't do justice to the job.

We actually refuse pictures, but we will let you know that; because you think we would take anything. We don't, because we have a quality, we have pride, we have an organization that gets business based on what our reputation is, the quality we show on the screen. So, we do work at that, and try to accomplish that very thing.

MR. OMAN: Thank you very much, Ms. Schrader.

Mr. Flacks.

MR. FLACKS: Just a few questions.

The point you just made and the ones you made earlier about the importance of quality, the high quality that you are able to achieve with present technology, and also the problems in some of the earlier efforts where quality may not have been so high. Adverse publicity may unfairly put the technology in an unfavorable light, I assume that quality remains the key objective.

In that light, do you care at all whether a broadcaster or producer who paid for the colorization process, alters the color of the film which

you have colorized for them; and if so, do you take any steps to prevent that?

MR. WORD: I'm not sure I understand your question.

MR. FLACKS: Do you care whether people alter the colors on films that you have colorized?

MR. WORD: How do they do that?

MR. FLACKS: Use another colorization process.

MR. WORD: Then they have created--

MR. FLACKS: And in a final analysis based on market response; decided that: "I am not quite satisfied what you are doing. I am going to change it."

MR. WORD: That's their right if they own the film.

MR. FLACKS: Basically you are simply providing a service, and they take the product and they enhance it.

MR. WEITZMAN: That's not totally true. Although they may have the right to do that, we have the--we work with the client step by step. He frames through subsequent frames, the final picture so the color will be exactly as we all agree it should look like.

If there is some error somewhere along the line, or if somebody's eyes should be blue instead of brown, we want to change those; but I think basically the work has been done, and everybody accepts it as the final work; but it could be changed if something was radically wrong. There is no question about that.

MR. WORD: In the middle of colorizing "It's a Wonderful Life," -- a couple of hundred thousand dollars had already been spent in preparing it.

It was one of the earlier films to be colorized--a technological breakthrough happened; and so a decision was made to pull back and re-evaluate, and so the process began anew; and it ended up costing over half a million dollars, because that film was an important film. To redo what was already done, rather than just leave it there and continue with the benefit of the new technology for the rest of the film, what was done was scrapped and it was started over just for the reason of maintaining quality.

MR. WEITZMAN: I wish I had a dollar for every original motion picture that had to be reshot extensively after the picture had been either completed, or two thirds the way through. When you had to go back and after you looked at the dailies, and you looked at the picture and put it altogether, the company had to decide to go back and reshoot a great part--much of the picture.

It's no different in the color business as opposed to doing it as an original picture. People make mistakes, and you want to remedy them.

MR. ADELMAN: To answer your question, if we had colored a picture for Turner or 20th Century Fox, and they wanted to show it in a different way, as copyright owner that's their right. If I own the picture and somebody is recoloring it, I think they are violating my copyright. If I have colorized the picture for one of these other companies and they want to show it in black and white, so be it.

MR. FLACKS: I'm curious about some comments you've made about international markets.

Is there any interest in licensing the various coloring technologies that you represent for use abroad or is there any licensing now?

MR. ADELMAN: There is definite interest in terms of my own company, Mr. Flacks. I have been having some active discussions with entertainment companies abroad.

MR. FLACKS: I am curious. One of the major developments in Europe is the explosion of the number of broadcast outlets, the number of foreign, and frequently commercial, television stations.

In light of the new and expanded market for telecommunications products in Europe and elsewhere, do you think that coloring technologies can become a significant element of the U.S. export trade for audiovisual works?

MR. ADELMAN: Yes, I do. There are a number of countries which don't even want our black and white films for television. People in the European countries, as I understand it, were introduced to television later than people in America, and they are accustomed to seeing black--I'm sorry--they are accustomed to seeing color when they put on a television set, not black and white, other than perhaps the BBC in London which I mentioned before. But in the countries which are now privatizing television networks, it is difficult to get a black and white picture, even an American one, shown. Now, if it's colorized, it definitely would be an increased market.

MR. WORD: I don't know if you will recall, but at Senator Leahy's meeting of May before last, Milos Forman in economy on the colorization, said that he had a director friend in Italy who was so very excited about now being able to convert all of his black and white films of which there is no market, to color so that they would be re-evaluated and enjoyed by

another generation; and I think that speaks well for the growing need for colorizing the black and white product.

We are different from the other two companies in that we are a sales and distribution company as well. We don't color other people's products unless we participate in the profits.

We have just sold all of our products to a distributor in Tokyo, and I am going there in two weeks to unveil this process to another country; and they are so very excited about it. A press conference was scheduled this week; but because I was here, they rescheduled it just so that they can have a lot of hoopla; and there is great excitement about it; because again, as they watch TV, because it came a little bit later, they are used to watching television in color.

So, there are wonderful shows and films that they have never even seen. They have only read about them, and now they have an opportunity to experience these American films.

MR. ADELMAN: I just wanted to add one amusing, if not ironic, anecdote. The very famous French director, John-Luc Goddard, made a wonderful film in black and white called "Breathless." Under French law, he has a right to make these decisions: he definitely wants to have that picture colorized. I heard it when I was over in Europe, and subsequently recorded it. And behold efforts have been made to stop him, the author of the picture, by the cinematographer's estate. That could be quite a mess, if that kind of I think premise of the legal system were introduced in this country.

MR. FLACKS: Just one question about the references in your statements, and in your remarks about consultations with opponents of coloring processes.

You pretty much told us what they wanted, which was final approval, in essence a veto, I am curious about generally what you are willing to consider as a reasonable relationship with these interests within a voluntary framework, what essentially you are willing to consider as an acceptable regular relationship?

MR. ADELMAN: Consultation is a word that is used very frequently in agreements with the directors and other talents in our business. That means listening seriously to their input and comments on the selection of colors, color theme, color tone, color drama, and going along with it where we agree, or argue with them if we didn't agree; but having the final decision for ourselves.

MR. OMAN: Let me thank all the witnesses very much. I appreciate your comments. Your full statements will be made a part of the record.

Mr. Baumgarten.

MR. BAUMGARTEN: Thank you, Mr. Oman. I want to say a word about Mr. Patry's question, because I have been sitting here thinking about it.

As I recall, Mr. Patry asked at the beginning whether these companies have a legal right or the customers had the legal right to colorize, whether they should do it over the objections of the directors.

I think it's important to point out that the reason they have the legal right is not unprincipled and it is relevant here. This Congress in this country--whatever may be the law in France, Germany or Italy or

elsewhere--has struggled for decades with the question of how do you deal with a collaborative work like a motion picture.

The answer has been clear and simple and consistent. And that is: you give the right to make those decisions to the employer for hire, generally the producer. And the right is given not because somebody wants to step on the toes of the directors or other collaborators, but simply because that is the only way one can assure the way copyright works in this country, rather than other countries, and assure dissemination, and to assure dissemination under its existing form or forms made available by new technologies.

If it were otherwise, we might have to conduct a survey, Mr. Patry, not only with directors, but every time a new technology came around, we would, I suppose under your premise, conduct a survey of the directors, cinematographers, script writers, scenario writers; and perhaps we should ask the authors of the books what they think of what the directors did to their product.

I think it's--the fact that the right exists--is very significant to the fact that these gentlemen and their customers have a right to exercise it, and it's not only a matter of the Copyright Act. I think it's a matter of the individual contracts that are entered into. There is a reason that virtually every contract in this industry gives all rights and all rights of proceeds to the director's service and others who contribute a service to the producer.

Now, because if it was otherwise, we would not be able to attract the

investment necessary to produce films either today or 20, 30, or 40 years ago.

So, I think that the right to exercise that is very much relevant to the right to exercise, notwithstanding the aesthetic objections, some of the participants in the film who sold their rights to object for rather handsome sums.

Thank you.

MR. OMAN: Thank you very much. I appreciate your coming today. We will be in touch with you over the next few months we prepare the study.

The next witness is Mr. Roger Mayer from Turner Entertainment.

While we are arranging the change of witnesses, I would like to recognize two distinguished members of the audience who came in a few moments ago. The United States Senate is well represented by Ed Baxter, the Chief Counsel of the Senate Subcommittee on Patents and Copyright and Trademarks; and by Matt Gerson, who works with Senator Leahy's Subcommittee on Science and Technology.

Thank you very much for coming over.

Mr. Mayer, the floor is yours.

MR. MAYER: Thank you, Mr. Oman.

You have received from us written comments, and you have heard from me through various committees several times. So, I thought that I might take a somewhat different approach; and that is rather than reading you a statement or trying to repeat what is in our statement, I will just make a few comments on some key matters that I think are of interest to you.

I will give you a little bit of background so that maybe the extent of my expertise, either positive or negative, is known, and then ask you to question me on whatever areas you would like to; because we have gone over these things many times, and we have covered key elements in our written statements.

Just to give you a quick background on me, I have been in the industry about 36, 37 years; and I am glad to hear that Mr. Weitzman has been in longer. I thought I was going to be the oldest man here.

I was with only two companies before I came to Turner. I was with Columbia Pictures for nine years, and I was with MGM for 25 years.

The MGM function is important with regard to what we are talking about, because my function was not only running the MGM studio from an administrative point of view, which includes a supervision of technology, but I also ran the MGM laboratory, which was one of the best motion picture laboratories in the business, and still is.

So, I was involved in that type of work, and one of my main functions was the supervision and preservation of the MGM library; and by library, I am talking about the 1800 films and the several thousand shorts and cartoons, and a thousand hours of television programming.

So, I did that for a long period of time, and obviously that was one of the reasons I ended up with Turner Entertainment Company, because Turner Entertainment Company now owns some 3300 movies, well over 1000 hours of programming, and 4000 shorts and cartoons.

When I was at MGM, I had been working on the technology of colorization with several of the companies -- actually both of the companies

--the first two that were represented here; and when Turner bought the company, we were, in a sense, ready to go forward with this type of work, because of the work that had been done for a couple of years prior to the time Turner obtained the library.

Without boring you with the whole history of the various deals that resulted in the pictures ending up with Turner, you should understand that Turner did pay approximately 1.3 billion dollars for this library; and there are two elements I think that are important in that statement.

Number one, obviously he bought it with the understanding that he would be the copyright proprietor, and he would be the owner, and he would be able to exercise the rights to go along with that. One of those rights was the freedom to distribute and the freedom to show these pictures in any manner whatsoever.

One of the keys to that of course is and also one of the things he was buying--was the preservation that had been done, and our expertise in preservation for the future.

We use the word "preservation" not only talking about nitrate to acetate conversion and other types of things where negatives deteriorate, but we also talk about what we call a preservation policy; and that is: when you own thousands and thousands of negatives, you also own printing materials like IPs and INs and CRLs. You own trailers. You own TV spots. You own foreign titles. You own superimposed stilted versions.

In order to keep these films available for distribution throughout the world in every territory, you have to have a policy which says you are going to keep these things in good shape, you are going to store them

correctly, you are going to treat them correctly; and when they start to deteriorate, you are going to have new ones made; and that's a very costly process, and that's what MGM did for all these years. That's what most of the companies now do--the most prominent until recent years were Disney and MGM--and the reason for that is the expectation that if you do have a preservation policy and you really don't know what you are doing it for, then when something new comes along, you will be able to have something available for that new technology.

That was particularly my own personal experience. That was particularly true for the video cassette technology, because most of the work on preservation and restoration was done prior to the time the video cassettes market came along; and all of a sudden that opened up whole new fields for the exploitation of these pictures.

I think colorization is another way that we will be able to benefit from the amount of money that's been spent, and the work that's been done on preservation and restoration and storage and all the other things.

We are currently spending about a million dollars a year on that kind of work, and we are getting the job done without too many exceptions. I can think of a number of meetings where we sat from time to time--when you are spending at least a million dollars a year on something, and you have to put up with budget meetings and that sort of thing, there is always an executive who will sit there and say, "Now wait a second. Couldn't we avoid that this year;" or they will sit there and say, "Well, look, it's fine as a principle, but why don't we just preserve these pictures, but let's not preserve those."

I went through a lot of those meetings, and fortunately I and others were able to convince people that you cannot operate that way. If you do so, you may be dead wrong; because what do you know about what somebody is going to want to see 5, 10, 15, 20 years from now? And you are certainly wrong on what's going to be a classic. Things come back, things become popular again, things achieve a status that you did not understand at the time.

I think HD TV is a whole other thing. Why preserve? Well, high definition television is coming in. The people who have film want to preserve the film. You have heard about, video tape preservation this morning. You have heard about what they are doing on video tape.

Well, we own a library, and the video tape preservation is terrific; but what we are motivated to do is preserve the film, and we are delighted that we have, and we will continue to so.

You will note that there are many more companies now making a decision to shoot on film rather than video tape, even though it's more expensive.

Why? Because they understand that film is over 2000 lines of definition and video tape is not. When high definition television comes in, you will be able to reproduce everything for high definition television that is on film, but you will not from the current video tape systems.

So, just to quickly tell how do we select films for colorization. Well, with some subjective input and some objective input, and not always very well; but it is a matter of sitting down, taking a look at the pictures in your library that are in black and white, seeing whether they in your

opinion are currently entertaining, currently would be something that the people would want to see. The answer to that is: how do you know? And the answer is: you don't, anymore than someone making new motion pictures who sits down and reads the script is right every time as to what pictures are going to be a success with the public. However, one would tend to want to choose pictures that--each of us will have a different list of classics--but that would include some of the same pictures. Because why do you think they are classics? If you think they are good and you think that people will enjoy them, that's why you choose them. So, the way that we do it, just to give you a little bit of input as a matter of interest, is that Turner asks a group of executives to get together with people that they feel know the films, and come up with a list of pictures that are recommended for colorization. We take a look at three or four or five different lists to see to what extent things are repeated from list to list; and then people sit down and run those pictures in black and white, and say, "Well, look, it still holds up. It's still a good picture." And, if so, then it is chosen for colorization.

Is that an economic decision? Certainly it is, but no more an economic decision and no less a creative decision than the decision made to make the motion picture in the first place; because we are spending \$250,000 to \$300,000 to do this. We also have marketing costs, and we obviously want to do it in a way that has economic consequences.

In regard to the restoration involved in the colorization process, I think I would be repeating what you have heard to some extent. However, I would like to address something that was asked about how it affects film.

In our case, it does affect the film. Although what we are working with in order to create a colorized movie is a black and white video tape, a black and white master made from black and white elements, we end up with a colorized color master from which duplicates are made for broadcast. In order to get there in our case, we get there from film so that we will have the film in black and white in its restored version.

So, colorization does have a positive effect. The positive effect is because of the restoration involved in the coloring process; but to my way of thinking, the more positive effect is that to the extent new technologies remain free, and everybody that invests in a picture or invests in a library feels that if anything new comes along, they will be able to do it; it really encourages the investment in motion pictures. When you are investing 10, 12, 15, 20 million dollars in a motion picture--and I would like to--I hope you will ask me some things about this, because I would like to address myself to this--you would have a chilling effect on the desire to make that kind of investment if it was felt that the director, the writer, or any other creative element of that picture could control and prevent you from distributing as you feel is economically sound.

I know of no particular proof over the years, that that has in any way destroyed the creative efforts of these people. Are there things that I have seen that I would not have done? Absolutely.

Are there things that have ruined the reputation of the director, due to the fact that they were done in a manner that really wasn't very good? I don't really think so, because I don't think that the public that sees this picture let's that reflect on the director; but the key element here is,

that you are not talking about a painting in which the cost is the cost of the canvas and the paints and the time of the painter; and you are not talking about a book which may be of a year or more in life of an author, but beyond that is not the kind of collaborative effort it does not involve that kind of investment. So, I do think there is a difference.

In regard to the European sales and the foreign market and so forth, I can speak perhaps a bit more expertly on that. I did not bring figures with me, but we would be happy to supply them. There are foreign sales occurring, most notably for us in South America, Italy and the Far East. We have made a sale in France, and that is the issue in that litigation; and we have made a sale to the BCC where it has not yet been played. It is my understanding that it will be. I cannot guarantee that, of course.

We look at it from a strictly commercial point of view; and to respond to the matter of whether or not this could be something that is good for earning money for the United States product outside the United States, I am certain that it is.

I guess the best example would be that we at Turner have just changed our estimates of foreign income on each of these pictures, and changed them in an upward manner substantially based upon our experience in the last 60 to 90 days. So, we think there is something to be said for that, and it is important.

In regard to the marketing of colorized and black and white versions, I would like to reassure you that not only is black and white available in all ways, it's available in 35 and 16 and 8 millimeter film, as well as in video tape; but we, in fact, make it available. There is no one that could

show that they have ever asked for a black and white that we have not supplied; and we are now attempting not just to answer the charges against us,--most of which we don't think are valid--but we thought that it would be an interesting marketing idea.

We are now marketing the black and white and colorized video cassettes together, with one ad side by side in video cassettes stores this summer, on two of our pictures. As a matter of fact, I brought along the advertisement if you would like to have that.

You might be interested--again, the charges were made without the facts--what this says is, the picture is "Adams' Rib," in this case, is an advertisement of the video cassette, and then in small type underneath, "Also available in colorized version and stereo;" and they are being marketed side by side.

You also might be interested, and old film buffs might be interested in the fact I did find out the sales--they've only been out there three or four weeks, so, I really can't give you anything definitive--but so far sales in black and white exceed those in the colorized version. Lots of people look at us and say, "Doesn't that disturb you?" Absolutely not. We are delighted. We are only looking to distribute these pictures, market these pictures; and if there are more people that would like to buy a video cassette in black and white than color, obviously we have no objection to that; and we welcome making them available.

I think one of the things I am noticing--and I am not sure this is anything that can be proved--I think that what has happened here with this controversy partly, and, partly because of the fact that through

colorization we are definitely getting distribution we did not get. These pictures are showing in prime time on national television, at least twice so far. They are being marketed by prime time. We are talking about 8 o'clock at night--we are talking about 11 pictures that have revenues of maybe \$200,000 each over ten years, that now have revenues of \$800,000 each in one year.

This is not just an indication that we are making some money, and that is not the issue here; but it is also an indication that it is not a phony statement on our part, to say that we are recreating interest in these pictures. We think they are marvelous movies. Obviously Turner paid a lot of money for them, and we would like to have them seen, and this is one of the ways to get them seen; and if they are seen in black and white and in color, or only in black and white or only in color, we see nothing destroyed. I will not again repeat to you the fact that nothing, in fact, is destroyed. You heard this, and I think you have got testimony to that effect.

So, we will make them available. The pricing is the same. We are currently labeling them. Our video tape versions on the air contain credits that say these are "colorized versions by...".

As soon as this legislation passes, we are prepared to change that. If it does pass the Film Preservation Act, we are prepared to change the labeling to that.

The same thing is being done on video cassettes, and we will be in conformance with that act as soon as it passes.

We have very, very strong feelings, somewhat along the lines that have been expressed to you before, and may be expressed to you later--so, I may leave that to other people--that this particular act has serious problems for us because of the kind of national censorship concept, to say nothing of the fact that I think a group of people sitting around trying to decide what's classic is almost a ludicrous concept. Anyway, that's a personal opinion.

As far as the market for the black and white pictures are concerned--

MR. OMAN: Can you hold just one minute? We need to change the tape on the video.

MR. MAYER: Sure.

(Thereupon, a short interruption occurred).

MR. OMAN: Roll 'em.

MR. MAYER: So, really--I think that really covers some of the areas, and I am prepared to--I urge you to throw them at me as you can; because as an owner of this amount of film, and as a copyright proprietor of this amount of film, we are vastly interested in having the right to continue to market it all over the world as best we can, because we think that's the best thing for the films; and that anything that prevents that is neither in the public interest, nor in the private interest.

MR. OMAN: Thank you very much. I appreciate the eloquence of your statement and the quality of your written statement.

You mention the unwillingness of people in this country, to spend the 10 or 12 million dollars that's required to produce a motion picture if they are not able to exploit the market to its fullest, if the creative

contributors are able to put thumbs down on any proposed plan to exploit the market.

The United States film industry is the most robust in the world. Do you think the European film industry would be more robust if there were no limits on market exploitation?

MR. MAYER: I do, Mr. Oman, but I can't prove it. I really do, because I have experienced--obviously, I have had a business relationship with creators throughout my life; and all members of the creative writing committee of the Director's Guild are personal friends of mine, and we have agreed to disagree; but in the main I can state quite categorically that most creators would like to retain control. They do not believe that their pictures are properly shown in the theaters, and in some cases they are right. They would like to be able to check every sound system. They would like to be able to control every projection system; and if I were a director, I would like to as well. They do not want their films shown on airlines, because that's not a very good way to see a film. They are right; it isn't, but it's part of the economic consequence of making one. And I can go on and on.

I mean, the television exhibition and 16 millimeter sound which is not very good, and--or at least not as good--and I think though that their claim that they don't go in here with open eyes. They know that this is true. It is part of the employment relationship. It has been part of the individual bargaining and collective bargaining over the years. And they recognize the fact that there does come a point that they will not be as successful, and we will not be as successful, if the control is not left to

us and the people who put up the money; and I do not feel that anybody can point to any creative destruction for that.

The strength of the American motion picture industry throughout the world, which is increasing I am glad to say, is partly due to this, I feel; because as an example,--and I have gone through this many times--directors would like to control which actor dubs the voice. They would like to control the translation that goes into superimposed titles; and again, these are creative things, and there are creative decisions to be made; and in many cases they are right, that it's not done as well as it should be. But if every time you wanted to dub a picture into French, you had to find a director or his estate to get them to approve the actors and the nuances and so forth, you would, again, chill the ability to go forward with this kind of thing.

Whereas, the French moral rights doctrine, I think, does allow a director to control things like that, and I think it's a real difference; and I think it's at least a part of the economic health of the industry in this country.

MR. OMAN: Thank you very much.

I have other questions, but I think I will submit them for the record in the interest of saving time, and move on to Mr. Patry.

MR. PATRY: Would you agree that the most that the directors are going to get from collective bargaining is the right of consultation, and not the right of final say over colorization and editing?

MR. MAYER: Not necessarily, although I would hope that that's the result. I do not think it's an idle possibility that they could get these

rights; because I would say to you that many of the creative rights that they have obtained in the past, such as the right to a first cut, the right to preview, the right to edit for television--I've sat around many, many meetings where the producers said, "No way we will ever give anything like that. It will ruin the business. There is just no way;" and in some way they figured out a way. Is there a way for the directors to be involved in this process in order to have a degree of creative input? I think there is, and I think it does relate. When somebody says you can consult, that is not an idle thing. That involves time. It involves money. I think it is a concession, and I think it is something they have earned. Is it possible in collective bargaining they could obtain the right to veto? Yes, it is possible. Is it likely? Probably not.

MR. PATRY: Mr. Baumgarten gave a classic chicken-little-sky-is-falling argument as to why this shouldn't happen, and in fact as you said the directors have obtained things in the past which producers fought and said, "Oh no, can't get this, because the industry will fall apart."

The writers feel, as I understand it, that they fought for the right of determining who gets the credit on the screen. As I understand it, the industry is probably rather relieved now that they do have that obligation rather than the producers.

So, perhaps it's a right that is being fought, and you are hearing the natural reluctance of people who have certain authority to not want to give it up; and perhaps the industry would not fall apart if they did obtain that right.

MR. MAYER: Perhaps you are correct, and I think that should be left to this kind of collective bargaining and individual bargaining.

After all, it is true that if some directors have been able to obtain certain rights in individual agreements that cannot be obtained in collective bargaining, it must mean that it is possible to give it to somebody. But I think the process works, and I think it should be left that way.

MR. PATRY: And in fact there is some high degree of self regulation I would think as well, that if someone has the right whether it's by collective bargaining or even by legislation; that if they exercise it in a way that's disastrous for all involved, that they will have difficulty getting work the next time around.

MR. MAYER: I would think that that is correct; and I would also think you can turn that around and say, that anyone that acts in a disastrously noncreative manner toward an asset that he owns, who, in fact, destroys something in the sense that the directors are talking about, then they have destroyed themselves; and there is no motivation for that that I know of.

MR. PATRY: Assuming that Congress were to interfere in the collective bargaining arena by granting rights, you noted in your statement that there might be difficulties. In fact, you said there is no principaled way to determine which parties, other than the copyright owner, should have moral rights. You give examples of cinematographers, actors, screenplay authors, soundtrack composers, and everyone else that is involved and that

it makes more sense to give it to one person, which is the copyright owner who is involved in the entire thing.

In the Director's Guild basic agreement there is a preamble which basically says that the director works directly with all the elements which constitutes variegated texture of the unit of film entertainment and information.

The director's function is to contribute to all the creative elements of the film, and to participate in molding and integrating them into one cohesive dramatic and aesthetic whole.

That seems to cut against the idea that the director might not be an appropriate person, in fact, to hold those rights rather than others.

MR. MAYER: I think that is the general and accurate statement, and I think it is a statement in principle and is not always a matter of fact.

If one had to choose anybody other than the copyright proprietor, and you were trying to come up with a list in the order of contribution, I would not like to choose between the director and the writer.

Maybe I am prejudiced, but I have yet to see a picture where the director made a good picture when the script wasn't very good, nor did the director make a very good picture if the story wasn't very good.

So, I would have difficulty choosing between them on prejudice. I think that a well written script can be directed by many directors to come up with a very good picture. A bad script no director can make into a good picture.

So, you have to make your choice there. As far as the cinematographers are concerned, I would like you to ask them rather than me.

I can tell you I have stood on sets as a cinematographer sets up every angle, told the director how to do it, told them where to place the actors, and said, "If this is the effect you want to get, this is the way to get it;" and then I have read the critic in the New York Times telling what a great job the director did in that, when I know damn well having sat there it was the cinematographer who did it.

That's the kind of thing that goes on all the time. So, I don't think there is a statement that you can make, other than he or she is extremely important and one of the major creators.

MR. PATRY: One final question. You testified about making the black and white and color available.

On page 9 of your statement you say that -- I will let you turn to it -- at bottom of the last paragraph, "Turner will make the black and white version of each color-converted motion picture available for theatrical and television distribution, and where commercially practicable will market video cassettes in black and white as well as color-converted versions."

I read that as having a distinction between always making theatrical and television versions in black and white available, but only making video cassettes of black and white when they are commercially practicable.

My question is, what's the basis for the distinction, and how do you define commercially practicable?

MR. MAYER: I think that the basis for the distinction was -- I think all that was meant here was -- that you can only make something available. You can't make somebody buy it. So, what this is meant to say, although it

might be somewhat misleading, is that the black and white versions will be available in both film and video tape period.

I think a distinction was made in order to get a video cassette made and out in the marketplace. It's got to be marketable. Someone has got to want to buy it. There really was no distinction meant in the statement. Everything will be available in the sense of if someone wants to license it, buy it, or whatever we do, it will be available. It will not be lost. We will not allow to deteriorate. Nothing is unavailable.

We cannot force somebody to buy it obviously, and we can't force a theater to run it; and I think that was the distinction we were trying to make.

MR. PATRY: Thank you very much.

MR. OMAN: Mr. Schwartz.

MR. SCHWARTZ: Just to follow up on that last point, the video stores would have to request the black and white video tapes, and have a demand for them because you wouldn't aggressively market them to them?

MR. MAYER: No. We are aggressively marketing them.

MR. SCHWARTZ: Now you are, but that wouldn't always be true.

MR. MAYER: It doesn't quite work that way. You better talk to the video cassette dealers.

The way I understand it, we can say, "Okay, here is a picture, and it's available in black and white and in color;" and we will.

If the video -- I don't know whether it is a wholesaler or if the stores themselves say, "We don't want that black and white. We will order a thousand color," that's as far as we can go; but there is little or no

problem in making black and white available under all circumstances, and that's what we intend to do.

MR. SCHWARTZ: Who makes available the advertising for the video tapes? Do you, or is it done at the video store level?

MR. MAYER: We or our distributor in this case, comes up with the advertising materials and the exploitation materials; and I think the cost thereof depends on the negotiations. Sometimes they're split with the video outlets and other times we pay for it.

MR. SCHWARTZ: The contents of the ads would always be your final decision?

MR. MAYER: Yes, it would be.

MR. SCHWARTZ: That would include whether and how to pitch the black and white tapes in the ads?

MR. MAYER: It would be attempted to control that. I am not knowledgeable enough about how that works, to know whether we can control it under all circumstances. The ads that I have seen are ads that we have approved and have control. I am not an expert enough to know whether we do that in all circumstances.

MR. SCHWARTZ: I have a question about the labeling requirements, which I know was fought very vigorously in the recent National Film Preservation Act which Congress has not yet passed.

Turner does have a policy that labels that a film has been colorized; but you fought very vigorously the notion that a director or any other creative artist would have a right to disclaim in the label, his or her

distaste for the final product. I assume you believe that that should be left to collective bargaining as well?

MR. MAYER: Well, that would be fine. I think it should be collective bargaining; but the reason that we fought it is that I consider it negative from a point of view of marketing the film to the public. In some way or other the public is going to look at this and say, "There is something wrong with it." When in many cases it was because the director would not involve himself; or in most cases neither the director, nor anyone really closely associated with that director, is available because unfortunately they are dead.

So, there is a negative feeling -- I think I used the term "Mark of Cain" -- that you get from that. We can live with that as stated before.

I do feel that it is not just a matter of labeling. It's not just a matter of preventing misrepresentation, because I don't think there was any misrepresentation; and I think the label and its contents has somewhat of a negative implication.

MR. SCHWARTZ: In the video that we saw, the title shot to Frank Capra's "Arsenic and Old Lace," was shown with the name of the director listed as prominently as the title of the film. If the director strongly objects to the colorized version, his name is still listed on the product, and it's advertised that way. It said "Frank Capra's Arsenic and Old Lace." Don't you believe that, if not necessarily as a deceptive practice, it implies that the director had a hand in the production of what it is the public is seeking, whether it's in black and white or color?

The average viewer wouldn't know whether the director had a hand in the colorized version or not. However much input the director had, as you and Bill Patry were discussing, the role of the cinematographers and the other creative people is less important because it is at least advertised as the director's picture and his or her name is on it?

MR. MAYER: I think that is an accurate statement. It is advertised as his picture; and if nothing were said, there would be an implication that he in some way had something to do with it; but I think we've negated that by saying it is a colorized version. You cannot educate the public as to the--whether or not someone was involved, but in most cases of course the people are not even here. I don't know to what extent that misleads anybody. I have never--my feeling about it is, that despite the fact that Mr. Capra certainly with great sincerity, objects to this process, it nevertheless has made one of his most wonderful pictures a classic, and that's "It's A Wonderful Life."

He may not see the truth of that, but it is true; and it is now a standard on the network every year, and one of the most loved pictures; and it was a flop in black and white. I don't know why exactly, but it was. I find it, you know, difficult to understand why this is something that he finds objectionable; but I do agree with you that to the extent there is a statement that the director's name is on the picture, anything that is on that screen somebody may think is something the director did.

It is also true it says Frank Capra's "Arsenic and Old Lace," in maybe a televised version or an edited version or a foreign version or any other number of versions, which he did not do and did not approve and hates

maybe. I don't see where he is injured, or where there is a matter of any effect on his career or his standing in the community; but I can't argue that there might be such an implication somewhere.

MR. SCHWARTZ: To move on to the issue of film preservation, to your credit you personally have been actively involved for many years in the protection of the MGM library.

Can you explain why the company did it? I think you worked under the principle of the preservation of old films, that you preserved everything and let the test of time decide in your case what is marketable.

The question is, was the film library actually losing money for the years prior to the advent of the video market? You said that you preserved all your film in expectation that some day there would be a future market for it, not knowing what it was; but in the interim before the video market, if these black and white films were commercial untouchables, or at least the majority of the library was, and there were only a hundred titles that are constantly being used, what was happening in the interim to the rest of that library, economically speaking?

MR. MAYER: Well, this particular library--which is the only one I can speak to, but I think it would be typical--was always profitable in one way or another on an overall basis.

You have to look at various factors. The profitability would shrink as markets shrank. The older pictures got, the less they were shown; and the advent of color television had a devastating effect on the ownership of black and white, and those things did occur.

That does not mean however that owning a library was a disaster; and the best example of the fact that that was not true is, the fact that Mr. Turner went out and paid 1.3 billion dollars for a library, which is more than most people would pay for bunch of new pictures.

So, it is a very, very valuable asset, but it is a depleting asset unless you have the opportunity to use it any way where people would like to see these pictures.

MR. SCHWARTZ: A last very quick question.

If private preservation activities are no longer economically worthwhile, do you think there is an increasing role for the Government to play in preserving a library; that is, preserving films that otherwise wouldn't be seen; and not just preserving them, but making them accessible?

MR. MAYER: Yes. I think that's something that needs a lot of discussion. I think there could be a role with the Government. I am not going to say how the government should spend its money.

I have been fortunate to be part of a private enterprise that was willing to spend private money, because it was worth doing. There are millions of feet of film that are deteriorating, that do not have any economic viability, or at least you cannot find anybody that thinks so. That is an area where the Government might step in and look at things; but where commercial companies own this film, and where they have consented to preserve and, in fact, are preserving, I think that would be a waste of the Government's money.

Do I think film should be preserved? Do I think video tapes should be preserved? I certainly do, but I do think the private sector in most

cases has the motivation to do so; and I think what the Government should look for is the areas where there is no motivation.

MR. OMAN: If I may follow up just very briefly. In your statement on page 2 you mention the practices that Turner uses in regard to colored motion pictures: the fact that you market both black and white and the colors, several other factors, the last one being that a black and white copy will be deposited with the Library of Congress.

You use "copy" rather than black and white original version. I assume that was not done for any ulterior purpose, but you will, in fact, deposit the original print.

MR. MAYER: What that meant was a print from any of--what version that we have the Library would want, but it would probably be the original version, yes.

MR. OMAN: I am glad I clarified that point. Thank you.

Ms. Schrader.

MS. SCHRADER: Mr. Mayer, you said that colorized film owned by Turner has been licensed in several countries, South Africa, Italy --

MR. MAYER: South America.

MS. SCHRADER: Sorry. South America. Have any transmissions taken place?

MR. MAYER: Yes, I think they have, Ms. Schrader, but I would like to get you that information. Let me supply that to you, because I am not absolutey certain. My understanding is yes, but let me get the information.

MS. SCHRADER: I would appreciate it if you would follow up with that. It would be interesting to know.

MR. MAYER: Yes, we will send that information to you.

MS. SCHRADER: Do you know if any of the broadcasters are seeking permission of the directors of the particular film have been subjected to any conditions on the transmission?

MR. MAYER: Not to my knowledge, but I don't know.

MS. SCHRADER: Some opponents of colorizing say that colorizing will have an important impact on future production of motion pictures; that the only way that directors who oppose colorizing can protect themselves in the future is, by making the motion picture in color in the first place.

Do you think that's likely to happen, that we will have virtually 100 percent color production? If it does happen, is that a bad cultural development?

MR. MAYER: It has happened. Ninety-nine percent of all pictures are made in color; and as far as I know, 100 percent of all television productions are made in color.

The only theatrical motion pictures made in black and white are ones from time to time made by directors--I think Marty Scorsese is making one now, and certainly Woody Allen has, although not in recent years.

So, in fact, it has happened, and it has nothing to do with colorization. Colorization really is an answer to the fact that the world wants color; people want to go into theaters and see color, and watch television sets in color and so forth.

What has happened is, that--and I have watched this over the years--at first when color came in, cinematographers and directors had certain creative feelings towards it, which made them feel that this particular

subject matter was not appropriate for color; this was a gritty picture, this was one about boxing, this was one about the Second World War, whatever; and really black and white was appropriate, not color.

As they over the years worked with color,--and I am putting words in their mouths, but this is certainly my observation--and they found that color could be desaturated, and color could be worked with from a creative point of view, that color had perhaps much more creative viability than black and white did, and then finally that color was in demand. They finally changed their thinking, and it is not even a matter of discussion anymore as to whether a picture should be in black and white or color.

Is it a loss that there are pictures not being made in black and white? I think creatively there is a loss, yes, because black and white photography is marvelous; and people certainly still take some pictures in black and white, although nobody takes their home movies in black and white anymore. But I think this is a matter again that both the creative community and the artistic community and the economic reality will handle, and I don't think this particular controversy will have any effect on it.

MR. OMAN: Mr. Flacks.

MR. FLACKS: Thank you.

I would just like to follow up first on a couple of questions that Eric asked.

First on the question of labeling, do you think it's possible for the parties affected to get together and agree on labeling standards, which go farther than the National Film Preservation Board legislation, if it becomes

law? Could refer to things including citing the nonparticipation of certain creative personnel?

Would you think that legislation, if it becomes law, pretty much closes the door on further voluntary labeling?

MR. MAYER: I don't think it does close the door, no; and if it's possible that an agreement could be reached that would be more acceptable to both sides, yes. I think the answer is yes.

MR. FLACKS: I know the focus of your testimony is on colorization, but I have a couple of questions that relate to the broadcasting angle.

Do you think it's possible for voluntary arrangements to deal with some of the conflicts which have risen about alterations other than colorization, particularly things like time compression and panning and scanning?

MR. MAYER: I would rather let someone that is an expert in the broadcast field discuss that. That really isn't my bag.

My comment would be from the point of view of the motion picture industry production where I have been, that it is not likely because there are so many individual television stations, and so many cable systems, and so many different competing interests throughout the world that I am not sure you could control it even if you wanted to.

So, I think it presents a very, very practical problem, and that you might have an agreement between parties that could not really control what went on.

MR. FLACKS: I am curious as well--just as a general practice, I have

noticed on some films shown on television an announcement that it has been edited for television, but it's not a uniform practice.

Do you think that those sorts of notifications might be possible in a more systematic fashion, and also dealing with other sorts of alteration problems?

MR. MAYER: Well, again, if I were in on those discussions and was a little bit more expert, Mr. Flacks, I could answer that.

I would think that the possibility should be investigated, because I think it's the type of thing that responsible people should do; but whether it could be done on an overall agreement basis and be effective, I really can't say.

MR. FLACKS: I also would like to thank you very much for your statement, which is very useful.

I don't mean this to be critical of your testimony. You have been quite cooperative in preservation matters; but in your discussions about the importance of preservation, you really suggested that the dividing line of public from private responsibilities--which left to the public sector is the area where the private sector has not preserved films.

On page 13 of this statement you do refer to film archives. You estimate that 80 percent of all American films made before 1930 no longer exist. That's a major and well-known cultural disaster which is the product of the decisions, or the failures to decide by very hard-headed businessman or women who didn't even think they were selling their birthright, they just let it rot.

I am not so sure that the dividing line between public and private responsibility for preservation, as you suggest, is one that can assure as much as anything can be assured that the disaster of the older films preservation won't happen to us in the future; but I do appreciate you had the willingness and Turner had the willingness and others will emulate it to cooperate with institutions like the Library which have national responsibility in the area.

MR. OMAN: Thank you very much. We appreciate your testimony, and we will be following up with written questions in the future.

MR. MAYER: Fine. Thank you. Mr. Oman.

MR. OMAN: At this point, I propose we take a five-minute break and give a moment to the audience. We will be working up here, and allow the Directors Guild to get set up for their presentation.

(Thereupon, a recess was taken).

MR. OMAN: We can begin again.

I welcome Arnold Lutzker, the counsel to the Director's Guild of America.

MR. LUTZKER: Thank you, Mr. Oman.

My name is Arnold Lutzker. I am a partner in the law firm Dow, Lohnes & Albertson. I am pleased to appear before your panel today, particularly because your concerns touch upon some of the most sensitive and important matters of artistic and creative expression for America's films directors.

For the past one and a half years, I have served as special counsel

to the Director's Guild of America, and that organization's challenge to the technological assaults on our film heritage.

In a highly public campaign, prominent directors, screen writers and actors have come to Washington to voice their outrage and their disappointment. Outrage at the drastic changes made to their films, or films of their colleagues in the name of progress; disappointment at the absence of any protection in American law to prevent what they view as mutilation of works of art.

Perhaps the most eloquent and moving plea was made by John Huston, who spoke, shortly before his death, to the Congress after viewing the colorized version of "The Maltese Falcon."

We have a video tape which is a living testament to Mr. Huston's anger even after his death, and I would like to have that presented now.

(Thereupon, a video tape was played).

MR. LUTZKER: With John Huston's inspiration, the directors complaint was presented by some of America's greatest contemporary directors like Woody Allen, Steven Spielberg, George Lucas and Sydney Pollack. Their case came at a fortuitous time because just as colorization hit the front pages, Congress debated the United States joining the Berne convention. To the directors, the Berne treaty with its firm expression of moral rights was and is the logical predicate for their relief.

As the directors repeatedly explained that the United States joined the convention, then it must assure its citizens a full measure of protection for moral rights in its law.

In the simple statement of Article 6 bis lies the potential for protection of their works. The Berne debate has ended in the House adopting and the Senate leading to a minimalist approach, which suggests that there already exists significant moral rights protection in U.S. laws.

However, no one could adequately answer the director who asked, "Where can I turn in U.S. law to stop colorization."

Perhaps in some measure, this hearing may provide a further record on the matter.

In your inquiry, you asked whether employing these new technologies affects the integrity of the films. I have another video tape which is instructive. This tape includes a CBS evening news story on time compression, and a Siskel & Ebert discussion of panning and scanning.

(Thereupon, a video tape was played).

MR. LUTZKER: The ultimate point just endorsed by those tapes is, yes, technology can undermine the integrity of the original films in a material way, in a way not contemplated by the original director.

This fact reflects upon the congressional testimony given by Woody Allen and Steven Spielberg in particular, when they each remarked that only the film artist, principal director or principal screen writer--not the consumer, not the user, not even the owner of the economic interests in the copyright--should be entitled to change the finished film.

Colorization, panning and scanning, time compression and the like, all processes which alter film, changing it materially and without the consent or even input of the creator diminishes the integrity of the film.

One of the difficult points of this debate is that alterations are being made to older films, ones made 20, 30, and 40 years ago.

Contracts which could offer some guidance as to legal entitlements are impossible to come by; and even if they were found, they would most certainly be silent on the significance of colorization or panning and scanning. After all, Ted Turner was barely a kid in those days.

In the course of my work with the directors, I heard a story which I am not sure is apocryphal or true, but which raises an interesting question.

The story is that Cary Grant's contracts provided that he did not have to appear on the set unless the lighting was just right; not too bright, not too soft. Legally he could walk off until the setting for the film was perfect. It was up to his director to get it right. Whether his contract required it or not, the director did get the lighting just right.

Now, how does colorization fit into that mix 40 years later? Black and white film lighting is an art form not duplicated by color computers, and colorization changes, hue shading and make-up.

Should Cary Grant or his director and their heirs have a claim of breach of contract if one of his movies were colorized? The directors would answer yes.

A sign from the Copyright Office, such a claim has a validity, and might send many scurrying for old contracts before they try to colorize their films.

We know today that in France some protection under a moral rights principle may be available. As the material we have already submitted

indicates, a French Court at the behest of the heirs of John Huston has stayed, temporarily the broadcast of a colorized version of the "Asphalt Jungle" pending a full hearing on the merits. That full hearing will be held later this month, and could clarify article 6bis rights and set an international standard for other countries to model.

Your inquiry also seeks to explore whether legislation is needed, and if so what form it should take. In the DGA's view, legislation is urgently necessary. The National Film Preservation Board, which Congress may finally enact within the next few days, is but a modest beginning. It is a proposal which acknowledges the value of film in American art, and which makes a simple effort at truthful labeling of certain motion pictures which have been materially altered. It in no way satisfies the concern of the directors of the films. Only the clearest statement that faithful adherence to the Berne principles of moral rights, and the entitlement of the principal director and principal screen writer to prevent material alteration of film without their consent will sufficiently answer their plea.

That concludes my statement.

MR. OMAN: Thank you, Mr. Lutzker.

You do mention the specific requirements that Cary Grant imposed for his participation, but still you would limit the rights to the director and the screen writers, and not expand the concept of moral rights (as some people understand them) to other participants such as actors and actresses that are in the motion picture.

How can you justify this in terms of artistic contribution?

I say that in recognition of the fact we have an artist with us, an actress from Australia, Ms. Johnnie Bridge, and it's a subject of great interest to her.

MR. LUTZKER: I think there are practicalities that the Director's Guild, in basically involving an answer and approach to the problems, have outlined.

They recognize their practicalities. Motion pictures are collaborative art, as has been explained dozens if not hundreds of people participate in the process, and the director, however, and the screen writer, as Mr. Mayer has also indicated, are people that throughout the entire film have principal responsibility. They are the ones--the director in particular--is the one that everyone entrusts to pull the whole project together; and if you could select one spokesman or two spokesmen in the sense of the screen writer who is also one of the founders of creating the concept of the films--if you could select spokespeople for that particular work, it would be the director, and it would be the screen writer.

Screen actors have officially acknowledged this position. Ginger Rogers when she testified before Senator Leahy, acknowledged that the actors--from her statement in representing the Screen Actors Guild--would place their trust and faith in the director who they felt they trusted to put them right on the screen to begin with.

So, there has been a general sense within the film community, that the director and the screen writer are the right people to assert the moral rights.

MR. OMAN: Thank you very much.

Again, in the interest of time I will turn to Mr. Patry.

MR. PATRY: We had testimony from Ted Turner that they paid 1.3 billion dollars to acquire its library, including MGM's film library.

In their written statement that say that from 1976 to 1986 MGM spent approximately 30 million dollars on preservation, and the last two years Turner has spent about 2 million 800 thousand dollars on preservation.

My question is, what has the DGA done to preserve classic films?

MR. LUTZKER: I am not personally familiar with all the activities of the DGA in this area, although the DGA in connection with their work in Hollywood has been very active in a variety of material.

I'll be pleased to provide some additional material for the record with respect to that.

MR. PATRY: We will take a specific example perhaps, "It's a Wonderful Life," one of the first films ever colorized, and a film that caused a lot of the initial adverse publicity. It was a public domain as failure to renew. Anybody can go ahead and colorize it, and anybody can go ahead and market it in the black and white form.

DGA members have been vociferous in their objections to it, as has Jimmy Stewart and others; but I haven't seen any indication that DGA members or anybody else has taken any steps to market it in the black and white form, whether in 16 millimeter or 35 millimeter. It seems to me that if the idea is to educate the public about the form, that it is the purest and best form for it, then why hasn't anybody who cares about it, and who has gone to Congress and the Copyright Office, done anything, in fact, to get it out in that form?

MR. LUTZKER: I gather taking "It's a Wonderful Life" in particular-- "It's a Wodnerful Life" was appreciated in the last 10 to 15 years as a classic American film principally in its black and white form. It was not colorization which made "It's a Wonderful Life" a classic film. It was classic in its black and white form.

As you know, the availability of motion pictures for television and theatrical broadcasting involves complex organizations involved in distribution; and those companies that are in business of distributing motion pictures have gotten the film out. I recall seeing the film regularly on television in Washington during Christmas Eve in the past dozen years, even without the availability of colorization. So, the film is out there. I don't know whether in terms of a particular director. The Director's Guild is a labor organization, and there are other people that independently market films.

MR. PATRY: Isn't it a fair statement though, really to say that the directors leave preservation and other aspects up to the producers and the distributors; and that they themselves really don't do anything in terms of getting out the films in the forms that they want?

"It's a Wonderful Life" you say you saw on TV. Yes, but was it panned and scanned? Was it time compressed and was it edited? I am really not clear whether the directors are doing anything other than complaining about what other people are doing, and not doing anything themselves.

MR. LUTZKER: I am confident--although again I have been involved in the Director's Guild focus on the Washington matters--but I am confident that the Director's Guild based in California--at least one wing of them

is--has worked with film critics and film schools in preservation. And individuals, I mean, you are looking at an organization of 8500 individuals, and many of them in their individual capacities whether the credit rebounds to the Guild, as such, or the individuals, have been involved in concern for films.

Again, I would be pleased to provide further information for the record.

MR. PATRY: That would be quite helpful.

Isn't it also true the fact that Turner's statement says that they have spent hundreds of thousands of dollars each year on projects involving preservation, and that the only way they can really do that economically is to exploit it in this other medium; and if you are successful in getting what you wanted, that in reality the result there would be less preservation; there would be less access to the works that everybody truly cares about?

MR. LUTZKER: The motivations for preservation I guess can vary, depending upon business goal and individual feelings.

Clearly the Turner Company sees an economic benefit in working through the films. I don't know what the Turner Company did in terms of film preservation before it hit upon the colorization opportunity, and clearly some of the guidance from the Copyright Office--if you want to get a copyright in the colorized version, you've got to submit quality original black and whites--may be a motivating factor in some of their activity.

There are obviously hundreds of people or thousands of people

involved in the film industry. Many people on both sides of this issue are very dedicated and concerned individuals about quality films.

I don't know whether completely attacking motivations is the point, but film preservation is an important cultural and historical concern. The point that Sydney Pollack made, for example, in connection with his congressional testimony was, that the black and white films that were made in the '30s and '40s, evoked a historical context, created a cultural milieu and image, which is distorted when they are colorized.

Preservation has become somewhat involved, but I think to a large extent it is a somewhat separate issue compared with the colorization question.

MR. PATRY: The question wasn't about motives. I think we can all assume that everyone's motives are excellent, and that everyone truly cares about the issues that we are talking about.

The question put more bluntly and crudely is: this is a capitalist society, and you are not going to get somebody like Ted Turner or anyone else to invest 1.3 billion dollars if they can't make a profit off it. They can't make a profit off of it, arguably if they can't market it in the very forms about which the Directors' Guild complain about.

MR. LUTZKER: Turner's motivations in investing money were quite multiple. The actual acquisition costs probably amounted to substantially less than that. He spun off studio space and lots and he used his super station in Atlanta was absorbing a tremendous annual cost with respect to the needs to feed programming on that particular channel.

MR. PATRY: The DGA wants to have final say in alterations--material alterations because its members believe they are in the best position to protect the aesthetic value of the film; is that correct?

MR. LUTZKER: Yes.

MR. PATRY: But the DGA doesn't mind if individual directors permit their films to be materially altered; is that correct?

MR. LUTZKER: Yes.

MR. PATRY: Okay. Individual directors could permit their films to be cut, colorized, mutilated, spindled, whatever as long as they say that's fine.

Now, my question is this: Since that's true, the desire that we are really talking about of preserving the original aesthetic value of the film is not for the public at all. If the public objects--let's say that an individual director permitted his or her film to be mutilated, and the public objected and said, "We wanted to see this film in its original form," then the DGA would basically say tough luck?

MR. LUTZKER: The film directors have explained that in their view, films--besides being entertainment--is art. To an extent, the Film Preservation Act that Congress was considering has some acknowledgement of that. The bottom line answer is yes. If an artist--if a film director agrees that this is the way the film should be, that is the way the film should be. It is to an extent a dictatorship of the creator. The creator says, "This is my work." Woody Allen recently produced a film that got very poor reviews, but that was his film and that's the way he wanted to do it. If you want to see that film, that's the way you have got to see it.

Maybe if it was in black and white and he colored it, more people would like it. That's not what Woody Allen wanted. If you want to see this film made by Woody Allen, that's what you do. If you don't like it, you say you don't like it. If you do like it, you have the opportunity but it remained. Milos Foreman had indicated--I think that there was an earlier reference to him--that he did four films in black and white. Two of them he could see colorized. Two of them he would not. He would want to participate in the process, and the bottom line is, that it is his reputation. As you--one of the others remarked. Frank Capra's name is up there as as large as the title, because that is what they are selling. It is their reputation. They have a right to say I want to change my reputation. I want it in color. Fine, you can do that, but it is their decision and not the decision of a third party, and not the decision of a consumer or viewer.

MR. PATRY: What about the cinematographer? What about the actors? What about the art director as with the case that Mr. Oman mentioned of "Breathless?" Is it really okay if Jean Luc Goddard wants to have his work colorized and the cinematographer says no?

MR. LUTZKER: I recognize we are not dealing with a perfect world; and if we got 150 or 200 people to work together on a film, you might have trouble finishing a couple of sentences, much less reaching a decision about it.

The director is recognized, as you read in the collective bargaining agreement, and is recognized by the individuals that work on films.

Now, there may be some examples of disagreement; but the general thrust and statement of the major unions that have been involved, and the major individuals that made their presentation, is yes, the director has fathered the film from beginning to end, and we will put our trust and faith in the director to see to it that the film is preserved the way that he believed it should be.

MR. PATRY: And if that trust is broken, then it's too bad?

MR. LUTZKER: If the trust is broken, then I think people may reassess it at some future point; but at this stage, we know that a director like John Huston is outraged at what is being done to "The Maltese Falcon."

You might find someone who worked on the film who would say it's fine that it is colorized, but it is clear that he is outraged by that; and there is no trust that has yet at least been documented that I am aware of, that has been broken in this area.

MR. PATRY: Except for "Breathless."

MR. LUTZKER: I'm not familiar with the "Breathless" situation, and I can't comment on it.

MR. PATRY: Your idea about having the director be the principal one, can't you really turn that against you and use the argument that I believe Turner made is that it's the producer?

I mean, if you are going to pick one person, then why isn't the copyright owner it? Mr. Baumgarten, who, if not the greatest lawyer in the world, is certainly the greatest copyright lawyer in the world, eloquently spoke about the principles set out in the Copyright Act about giving it to

the copyright owner. So, if we are going to pick one person, why not stick to the principles that are enunciated in the Copyright Act?

MR. LUTZKER: With all due respect, if you start with Mr. Turner, Mr. Turner is basically involved in a corporation. A corporation is essentially a group of individual shareholders who own stock in both, and so forth. To say that they--stockholders--through their appointed individual, can make the artistic judgment with respect to films seems to be carrying it too far.

The people involved in the making of the films have, with relatively single voice, said the directors should be the ones to make these decisions.

MR. PATRY: Don't they have that right presently? Couldn't the directors say, "Hey, I am going to finance this myself," or, God forbid, "I am going to take less money for this picture to have it made the way I want to"? Isn't what you are really saying is, you want your cake and eat it too? You want the high salaries that you get for it, but you also don't want the financial risks of having it edited afterwards?

MR. LUTZKER: I think you have to sort of keep an historical perspective on this debate, too. The films that are being colorized, if we are focusing on colorization, were made 20, 30, 40 years ago.

If may be a different sort of situation today where the directors, the writers, and everyone knows colorization is out there, and this is one of the new technologies we have to deal with.

We are looking retrospectively as well. These men made their claim on behalf of their colleagues whose films were made 40 years ago, and were trying to say how should society deal with changes made where the expectations, the social contracts, the economic contracts that were made 40

years ago when John Huston made "The Maltese Falcon" colorization was not a factor--if you are saying today shouldn't they have more of a stake. You know, Woody Allen has a production company. He can make his own movies. Again, there are only a limited number of people that might be in that individual situation.

MR. PATRY: The response of course you would get from Turner and others is, that your example of 30 years ago is actually a very good one; because at that time the--heyday of studios--the directors' contribution was not as significant; but we heard a lot of testimony on that.

One final question in terms of the moral rights that you want. You make a distinction between production and postproduction as I understand it; that you accept the idea that during the production of a motion picture, however things shake out they shake out. After it's been completed, then you want the ability to stop material alterations to that film. Is that accurate?

MR. LUTZKER: I would just clarify the phrase "postproduction has meaning within the film industry,--which is after the conclusion of filming, they then do the postproduction work and put the finished product together.

There is a point which the directors have defined as after previews and theatrical releases when you try it out. You come up with everybody has agreed: this is the film; this is what we are going to let out in the market place. That is the film that all parties involved signed off on, and that is the one which thereafter material alterations would require consent.

MR. PATRY: My question is this: When you are in that production process, you are using pre-existing works typically. You are using works of a novelist, for example. You are using works of performers or composers.

For them, that is postproduction process. My understanding is, you would not be in favor of granting moral rights to a novelist whose work in his or her opinion has been mutilated; is that correct?

MR. LUTZKER: The issue of right--what films do to books has come up frequently; and the basic point is that if a novelist or author contracts and has a one-on-one relationship with an entity to produce the film, they have that right; and they cede whatever rights or they retain whatever rights in that contractual relationship.

After that contract is executed, what is done with the film, they have basically acknowledged. Their moral rights with respect to their work relates to the literature, and not with respect to the film.

MR. PATRY: That's right, and that same argument can be made for the directors; can't it, that they're one-on-one with the producers and that it is purely a contract matter. If you are going to treat the novelist and everyone else as a contract matter, why shouldn't you treat the director as a contract matter too? What's the difference?

MR. LUTZKER: The primary difference is, that we are dealing in cases of colorization with works that were made decades ago; and the effort now is to take a work of Frank Capra's, for example, or John Huston, and to make drastic changes. I mean some people may view--and I might be among them--view a television screen of black and white film and see the color version, and it doesn't look that bad. What is the big deal? Well, the big deal is

to the people for whom the creative effort was of their sweat and their toil, the sophistication that they put into it, their image in not just 1988, but looking decades into the future, and what people will think of their work--and that's what they are concerned about. It's more of an historical concern with their reputation, and they care about this. They care about it passionately.

MR. PATRY: Don't you think the writer whose work has been butchered cares passionately and cares about about his reputation or her reputation in the the future, too?

MR. LUTZKER: There may be a contractual basis that they can deal with that, but you can still go to the book. Their reputation is made in the book, and that is what they created. They were not a film maker. They were a writer.

MR. PATRY: Thank you.

MR. OMAN: Mr. Schwartz.

MR. SCHWARTZ: I have questions about moral rights and the ability of the rights to be enforced retroactively. Let's assume Congress were to change its mind before the passage of the Berne legislation and reconstitute the original language in the Kastenmeier bill and explicit moral rights provisions enacted today. How could the directors argue they could get past the Fifth Amendment arguments made by Turner and others about the Government's "taking" from the copyright owners rights that they bought?

MR. LUTZKER: It becomes a question of what are the rights--I mean, a bundle of rights of copyright--I will draw an analogy to cable television.

When Congress passed the 1976 act it made major changes with respect

to the cable television industry creating a compulsory license, forcing in effect, certain access in the context of public availability of programming.

Supreme Court cases before that raised questions about rights of those programming with respect to cable television.

Congress can, in the context of defining what are the copyright rights, mold and make changes in them during the course of legislating copyright.

This is also evidence--this is the constitutional basis--

MR. SCHWARTZ: And you believe that directors could have the right to stop colorization of films that were made 30 years ago if explicit moral rights were enacted?

MR. LUTZKER: The owner of a film has a right to do what he wants with that particular film, subject to whatever limitations Congress might impose on it.

MR. SCHWARTZ: Panning and scanning has existed since 1961 or '62, and the directors have basically held their noses and gone along with it because they very honestly understand that there is a lot of money involved in showing films on TV. There is a lot of money to be made, and it's good for all in the film industry. How can you be sure that if new moral rights were enacted that the courts would rule that panning and scanning, which has been done for 20 years, would be defined in any way as a mutilation or distortion of a work, when you have 20 years of precedence of allowing this practice to continue by the parties trying to enforce the right?

Maybe the directors haven't liked it, but they have allowed it to continue as a contractual right of the studios and producers.

MR. LUTZKER: If the case were brought, that would obviously be a factor that would have to be dealt with. I don't know how a court would handle it.

Certainly industry practices can have bearing on their decision in that regard.

The directors have explained that colorization was the last straw. They had seen their films exhibited in a fashion which distressed them for many years, and they did live with it under the system, and have sort of reached the breaking point.

How things would end up in the court context, it might be difficult to predict.

MR. OMAN: We are running long.

Let me explain briefly what we are going to do. We are going to break as quickly as possible--ask all the questions we have to ask of Mr. Lutzker, then break until 2:00. Then we will come back with the video dealers, and take the Motion Picture Association thereafter.

I hope to have about 45 minutes for lunch, if that's okay with all of you in the audience.

Having said that, let me turn to Ms. Schrader.

MS. SCHRADER: Mr. Lutzker, with respect to the moral rights that the directors seek, are any time limits placed on those claims? Do you see any limit to them?

MR. LUTZKER: I know the directors would like an open-endedness to it. I think that the notion of copyright obviously has limited durations.

MS. SCHRADER: I was going to ask you if you think an unlimited right would be within Congress's authority.

MR. LUTZKER: I have thought about the issue. I can't say as I resolved it.

I think it is a difficult question, and clearly they would like as long a period of time as would be legally appropriate. To say forever less a day might satisfy them, might be subject to go on forever.

I don't have an immediate answer to that, but I think that is one legal question. Certainly an extended period of time would--I mean, we are looking at an art form, which has basically arisen in the last 50 or 60 years; and I think they are looking certainly to some distance in the future, minimally the term of copyright which is 75 years.

MS. SCHRADER: Regarding what would constitute a material alteration. I believe the phrase used in the Film Preservation Act, and certainly the Film Integrity Act that had been proposed, is really not further defined.

What realistic limits would the directors place on the nature of the changes, so that there would be some changes that could be made that are not objectionable, and others perhaps that could be objected to?

If you can't respond now in detail, perhaps the directors would think about that question, and give us a response later. The idea that you could have a system, where apparently an objection could be made simply because an individual director doesn't like what happened to the film, doesn't seem to be a system that can realistically be administered by the courts.

MR. LUTZKER: Well, there has been some effort to define and explain the nature of material alterations. Certainly there are some things that are clear. Colorization constitutes a material alteration of the film work.

As the tapes have shown, panning and scanning under current technologies with the letterbox technique at least provides an alternative to panning and scanning; and directors may feel that also has some problems.

Time compression if you look at the technology--again, the example with the closing scene from "Casablanca." The changes that are made in the pauses and the like, constitute things that they feel are materially--potentially materially--changing the integrity of the film.

MS. SCHRADER: Just one follow-up question.

Are you saying then that every colorized film is objectionable--that every act of panning and scanning is objectionable? You are not really saying the alteration has to be material?

MR. LUTZKER: No. Material is a word which the courts do grapple with in various degrees. The incidental use of the panning or scanning may not be material.

Colorization is something which is done to the entire work of art, and that's a little different.

MS. SCHRADER: You are using "material" in the sense of the quantity of the film that has been changed?

MR. LUTZKER: I mean there are examples--yes. Milos Forman who directed "Hair" describes a version of that film, which had been edited, and lost approximately a third of the time. Editing of that sort, I mean you,

can quantify materiality in some respects. There may be other standards that may need to be--a single pan or scan may not necessarily be material with respect to a particular film.

MR. OMAN: Mr. Flacks.

MR. FLACKS: Thank you.

You said that you think legislation is urgently necessary.

Specifically, do you think that H.R. 2400 is the essential framework in which these questions should be considered, or do you think some modified version of that, or a whole new proposal should be considered in the next Congress?

MR. LUTZKER: I think H.R. 2400 expresses as far as the film community--film director is concerned--the parameters of the type of legislation they would like to see. There can be changes in that. That would be the general framework. The notion in Congress was Kastenmeier's original version of incorporation of moral rights language is another alternative.

MR. OMAN: Thank you.

That concludes the questions.

Thank you very much Mr. Lutzker. I appreciate your being here. We will be submitting additional questions for the record.

The hearing stands in recess until 2 o'clock sharp.

(Thereupon, a lunch recess was taken).

AFTERNOON SESSION

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MR. OMAN: We can come to order. The next witness will be taken out of order, because we are trying accommodate people's varying requirements.

We have with us right now Mr. Joshua Sapan from the American Movie Classics Channel.

If you could identify the American Movie Classics Channel and where you are from, we would be grateful.

MR. SAPAN: Certainly. Thank you for the opportunity of amending the schedule accommodation. I am the President of the American Movie Classic Channel, which is a cable TV service that serves 13 million subscribers across the nation. It carries a variety of different services in different markets from New York to California, Miami, etc.

MR. OMAN: Headquartered where?

MR. SAPAN: We're headquartered in Woodbury, Long Island owned by two cable companies, one called Cable Vision and the other called TCI.

We have been in business since 1984. We are carried in a number of different configurations in different areas in different cable systems.

I guess I want to address what we think is the issue, and that is really not to denounce the technology of colorization itself, but really to determine whether or not the technology ultimately denies access to an important part of American's heritage.

Another question I guess that I think is worth addressing is, if the process is allowed to proceed without restraint, what other technological

alterations--some stated today and talked about, and some unforeseen--are likely to follow?

For purposes frankly of drama, but I think it is Relevant, we have constructed a brief 60-second tape that illustrates what could be a foreseeable next step if the adulteration of films is allowed to occur.

If we could play the tape.

(Thereupon, the video was played).

MR. SAPAN: Excuse the theatrics. There is a point in it and a rather serious point, as we see it, and that is, that what we saw there though entertaining I think to some degree when one looks at it is not necessarily good.

I guess the question when we think about it is, can it happen? I think the answer is, absolutely. It may be the next logical step.

Would it increase viewership and expand the market of the viewership of this film? It conceivably could, but ultimately the question is should it be allowed? Should the free market be allowed to adulterate the movie in that manner? I guess we think the answer is it should not.

We are here to discuss what happens with colorized movies. My real feeling is, that if the decision moves along as it appears to be headed, we may regret what we have done as we look back, in future generations, and see that we were somewhat shortsighted.

The tape we just played is an extension, and it is indeed an extension of today's conversations about what could happen; but I think it is exemplary.

Changing the soundtrack is very easy to do if one is so inclined, and I am sure that research could be produced that would demonstrate its appeal to younger people; that they would prefer Madona soundtrack to one by Irving Berlin, but it's not okay for us to do this.

It's not okay for us to do this and claim to preserve the original film; because the nature of the way people experience most things is, that they go to the most immediate popular material. Whether it's good or bad, as long as it is fashionable.

The effort to colorize black and white film is a way in that sense, to appeal to the most immediate and possibly the basest interest.

I think in large part the interest is economic gain. We have, in fact, as we were asked to do in the prepared papers, conducted some research on the appeal of colorized movies; and we found in markets that are representative, I think, reasonably of the country that our subscribers-- who are viewers of American Movie Classics -- are strongly opposed to colorization.

I guess there is no shock there because they are people who watch the black and white movies that, in fact, make up the American Movie Classics. We don't show colorized movies, or movies that are adulterated many form. But we don't dispute the research or the testimony of the people who have spoken previously who say there is indeed, a very strong appeal. In fact, the appeal could to some degree expand the audience for movies in this new form.

I think the key thing we have to offer is that appeals, not necessarily what determines access. And access is the key word. In large

part what determines and creates access is what is most immediately marketable to the largest and in some cases, the newest audiences.

We have heard today from the proponents of colorization that say as long as the original version of the film still exists, the consumer can choose between the two. As a movie exhibitor, my own feeling is that is to some degree, a fallacy. The issue is really not the existence of both versions of the film. It has nothing to do with allowing the black and white negative to be held in a vault somewhere, or to exist somewhere. The real issue, and I guess it speaks to the manner in which the movies are consumed, if you will in America, is about proximity and about accessibility. The mere existence of art doesn't guarantee the experience of it, and people will see the distorted version instead of the original. The real issues I think as we look at colorization are accessibility, availability, and preservation, but accessibility number one.

Research is not the primary reason to oppose the colorization of classic films. The primary reason we feel is broader and more important. It's the preservation of culture, and again access to those cultural artifacts. Such preservation we think in the long run also fosters ultimately the economic enterprise; and as a business exhibiting these films, we can help prevent the disintegration -- if you excuse the drama -- of that piece of our cultural heritage.

I guess I think that we may be able to learn a little bit about this issue, by looking at a couple of other arenas where this same substantive issue is taking place.

Because seems to me that the question is often grappled with by societies and Government is how to balance consumer demand, current economic interests, and the need for the preservation of culture.

Take, if you will, architecture as one example, and excuse the analogy. I will try to bring it home rather quickly.

The question is I think if you look at architecture, should all buildings be adapted or torn down if it suits the current economic climate? If land is exploitable by developers and usable by consumers, should we protect it or allow unrestricted tampering? What happens to a society that doesn't protect it's cultural artifacts?

What happens is, I think, we get the distortion of cultural history. I think that is why so many Americans travel to Europe to see its cultural traditions. Europeans, arguably, have done a much better job in protecting their architecture and history. With no thought of the future and no sense of the past, we could destroy all the artifacts of our dynamic culture.

If one looked exclusively at the consumer interest or demand and short-term economics in the field of architecture, I think we would end up with no historic preservation, and, arguably, very few buildings that were built before the 1950s would remain standing. The reason is, that in primary real estate areas, there is always the opportunity for additional development and exploitation of property. It is always there. There are always people willing to rent apartments for retail space; but our society, as is it relates to architecture, has determined that it is for the benefit of all the people to protect certain buildings and to preserve certain neighborhoods.

Architectural and historic preservation says that if there is a reason to preserve architecture, it is because of its part of America's past and history. In fact, preservation in certain areas has resulted in more vibrant economies. In areas which have received landmark designations such as nearby Georgetown, Philadelphia's Society Hill, and New York's Greenwich Village, tampering or development is either completely restricted, or constrained by various specific guidelines. The effect I think in those areas, has been to maintain what are now some of the most vibrant tourist areas. Nevertheless, there will always be those developers who would, if they were not legislated to do otherwise, dare to develop and exploit the property and disregard history.

I think one more analogy and I will be finished with the analogies and

has to do with literature, and may be even more relevant to what we are dealing with today.

We have wonderful novels that are taught in our schools, "Moby Dick," "For Whom the Bell Tolls," "Of Mice and Men." We have condensed notes that are often marketed under the brand name Cliff Notes.

I had them when I went to school, and they have been around quite some time. They are brief 20-page synopsis of each book.

Given the option, I think that almost every case a child would not read the full book or the literature, but would read the Cliff Notes; and, in fact, teachers have a tough time making sure that kids read the books, and don't just buy the Cliff Notes and take the test.

I think that people realize it's quite important to the children's education to read the literature. To deny children access to the books, to lock the books away and keep only the Cliff Notes accessible would amount to, I think, cultural deprivation.

At best, the book and notes side by side in the bookstore, still most would choose to read only the Cliff Notes; but just as with film, limited access to the original would be real deprivation.

This is the direction I think we are headed. The mere existence of the original, I think Cliff Notes may bear out, is not enough. Because when the tampered version exists, access to the original by virtue of the forces of the market and the inclination of a consuming -- the public, may, in fact, ultimately limit access to the original.

If you believe that American literature is important, it's not enough to have those books available in just three esoteric bookstores in America; because if only the Cliff Notes are readily available to the children of America, we have not made that preservation and availability of the original meaningful.

We can just say it to ourselves, and it doesn't have meaning in terms of what their daily experience is like. I think ultimately we sort of pay the price for it.

So, if we relegate something to the closet and don't put it on the shelf and get wide distribution, and utilize the marketing mechanisms of the American system of business, we essentially shut off access to consumers. So, it is not enough to allow something to exist. You have to support it in a system that in reality provides opportunity for exposure. It's a fallacy

to say, as some have said if it's there and it exists, it's there. The truth is that "there" doesn't end with existence. "There" ends with a real determination of access, availability, and distribution.

The limited distribution of black and white films has not yet had an effect on the American Movie Classics. Our library consists of movies already licensed from many studios. The contractual agreements specify which films we can air, when we can air them, how we can promote them, and the quality standards we require. Our current contracts have not been affected, though we were asked during negotiations if we will take colorized films, and we won't. Colorization is now clearly an issue for the studios that own the films. The process of colorization is extensive; and once a film is colorized, the company needs to recoup that expense.

If we allow those forces to dictate, then the all important access ultimately could be very seriously threatened.

If we look at the precedent, we can see what will happen if we simply push the colorized version. It will be harder and harder to get hold of a black and white version; and, in fact, it really then ultimately fails as readily accessibility distribution. It may become something which is ultimately inaccessible.

The -- I guess the other question is, coming back to the little bit of the theatrics in the front, is what is next. If we adulterate the material to increase its popularity, and take the creative decisions out of the hands of the original makers and put them in the hands of the business people, then exactly how far do businesses go, and where are the implications?

What, in fact, if we do change the soundtrack? It is arguable to say that we are creating the same mood as you saw in the piece of film that we showed a few moments ago, but contemporary music makes it more appealing. So, if you use the argument in that sense for procolorization that it will expand audiences, then you would change the soundtrack and use contemporary music; and you have heard what it would sound like. It is the next logical step in the exploitation of material, by people who are looking to increase the marketability of what I think is arguably art; but at the same time, it destroys the very essence of it.

It's not acceptable to say that the existence of it makes that activity acceptable.

Our concern is really not for the immediate from our own point of view, but for ramifications for the people viewing the films. It really is for five years from now.

When the colorization technology is improved, when the color-washed picture doesn't look quite so bad, and when the colorizers can market a better new and improved version, the danger is that access to this cultural artifact I think does have some meaning.

It does have some real merit in terms of understanding what was made, what was intended. What the experience was like will disappear. People won't have the opportunity to see it.

If that time comes when only the colorized versions are available, and the memories of black and white films are only, in fact, memories, I think we may have done a disservice to future generations.

Thank you very much.

MR. OMAN: Thank you very much, Mr. Sapan.

Could you just state briefly again your proposal -- what it is that you propose the Government do to save the day?

MR. SAPAN: I am not certain that I have an entirely specific proposal as to how the Government should act.

I do think that there needs to be -- that the actions need to absolutely insure the present access to the current viewing and consumer public, and the future viewing and consumer public.

The issue on which the activity should turn should have to do with not only preservation, but with access. In truth I can't presume to exactly figure out how to do it, but I think that is what is fundamental.

MR. OMAN: You mean access in ways other than having a print available in the archives in the Library of Congress?

MR. SAPAN: Right.

MR. OMAN: Even if there is no market for or public interest in the material?

MR. SAPAN: I think there is public interest. I think that is --

MR. OMAN: If there were public interest, don't you think it would be available? There would be access?

MR. SAPAN: Can you say just what you said?

MR. OMAN: It just makes economic sense to me that if there were public interest, the free market being what it is, Copyright owners would want to fill that demand, and there would be access, and there would prints available of the original.

MR. SAPAN: I guess I am not sure from where I sit that it is that simple, that the free market works so and without flaws.

I think that a couple of factors may mitigate against that in the case of colorization, and I think one is that people -- consumers tend to be inclined to go toward that which is most familiar to them.

If you put in -- excuse the word-- dazzling colors, as we did in our example with a familiar and contemporary soundtrack, on a movie, it may increase the appeal and marketability, and the free market would drive toward that.

So, at least in response to your question, I would say that that is a dangerous reliance to have as it relates to literature and art or popular culture, if we can define it and use it that way.

So, I think there may need to be some activity on behalf of the Government, that assures that access remains. The free market can't presumably work by itself.

I think secondarily what seems to be occurring is, that the investment in colorized films, and the accessing and recouping that investment could -- say a bad word -- color the activities of the free market so it is not entirely responsive to the interest of the consumers, but rather was driven to rationalize and recoup an investment.

So, that creates a business prejudice as well as the consumer prejudice I mentioned earlier.

MR. OMAN: I was wondering whether or not the American Movie Classics Channel shows only uncut movies without commercial interruptions, and no panning and scanning and all letterboxed to preserve the original structure?

MR. SAPAN: We show no commercials. None are interrupted. Where we can show movies that are not panned and scanned -- I don't think we have 100 percent track record in that, because we are not able to find movies in every case that are not panned and scanned.

So, we endeavor to do that wherever and whenever possible, and whenever the American films are available in that manner.

MR. OMAN: I have no further questions.

MR. PATRY: To follow up on your question about the free market, you are a profit entity yourself; are you not?

MR. SAPAN: Absolutely.

MR. PATRY: You don't want the Government telling you what you can show on your channel; do you?

MR. SAPAN: Immediately I would say no.

MR. PATRY: Would the answer change if you reflect on that?

MR. SAPAN: It depends upon what the issue is.

MR. PATRY: The Government says you will only have to show films that were designated as classics by the Library of Congress, would that be okay with you?

MR. SAPAN: Probably not.

MR. PATRY: So, at least for your business, relying on the free market is fine?

MR. SAPAN: In large part, yes.

MR. PATRY: But it's not okay for the people who want to exhibit or distribute films that have been lexiconned, panned and scanned, and colorized?

MR. SAPAN: I think it has some dangers.

MR. PATRY: You don't have any facts that controvert what Turner has stated about availability of black and white prints?

Turner has said that they will make black and white prints available period for theatrical. You talked about some sort of idea that may be in marketing that would be skewed, but you don't have any facts that would controvert what Turner said; do you?

MR. SAPAN: No, not specifically. Although I think there is a fair amount of observed consumer behavior, that would suggest that over an extended period of time that which is more contemporary is consumed somewhat more.

MR. PATRY: I wanted to ask you about that too.

On page 3 of your statement, you say the nature of the way people experience most things is that they go to the most immediate popular material, whether it is good or bad as long as it is fashionable; in the effort to colorize the classic black and white films is just a way to appeal to the basest interest or the most common denominator.

My first question is, whether you have any data, any survey or something that people are in fact motivated by the base interest, and that they really kind of go to the immediate most popular things?

MR. SAPAN: I think if you look at for instance the television industry itself, and the structure of the broadcasting side of it particularly, I think what one finds is that -- and I think the economics tend to influence that.

What one finds in broadcast television is, that for programs to remain on the air in largest part, they need to appeal to a very substantial audience. They need to appeal to 20 percent of the viewing audience at that time, in order to be carried on a minimum a broadcast network.

We think -- I think that there is some danger in that, or -- and that it is not necessarily the best interest of our society to set up a structure for broadcasting dissemination and information and opinion.

That makes that an obligation of existence to be viewed by that large group of people.

I think somewhere in our past the Government saw fit to set up public broadcasting, which was there in part to provide alternative programming that would not necessarily reach that big group of people, because they felt there was some import to it.

MR. PATRY: It seems to me you are caught between two positions. One is that either people are too stupid to know what they want or can appreciate good things; and if that's the case, then you have to determine for them what they have to see.

I mean, it's marvelous that you have your show, and that you are taking the steps that you do to make sure that you show things in form.

Isn't what you are really saying is, that everybody has to watch things the way you want them to; and if they are too stupid to appreciate things the way you think they should be done, then A, you either educate them, which you might believe is a hopeless task; or B, you simply are going to deprive them of it legally?

MR. SAPAN: That really isn't the sentiment we have towards viewers or consumers whatsoever. The sentiment has to do with the inclination on the part of viewers/consumers to gravitate toward that which is most familiar, that which is most immediate and popular, and that which provokes an immediate response; and that inclination unchecked is potentially dangerous.

MR. PATRY: How are you going to check it?

MR. SAPAN: I think a number of things are going to check it in a way -- the effect that cable and broadcasting issues are currently organized.

I think that there are laws. There is something called prime time access that tends to (simulate) local programs. There are a number of constraints and constructions that are made in order to mitigate that.

I think that they need to be reasonable. They can be liberal. They don't begin to presume that people are stupid, but they do attempt to protect to some degree for minority interests, different points of view and minority interests.

MR. PATRY: Are minorities protected by your show -- your channel, and you really have got it fixed so either you say I am not going to let people watch things in forms we don't like, or you are?

MR. SAPAN: The argument that I tried to suggest in the end when I was asked a question by Mr. Oman about what I proposed, was not that -- I didn't propose anything specifically.

What I did suggest is, that we need to insure in some manner the access to what we consider is a piece of American heritage; and if one believes that the access is, in fact, in danger of disappearing, and that it

has some merit to view things in its original form, then some sort of control needs to be in place to insure that that access occurs.

It sort of ends there, and that seems to me a fairly reasonable position to take in that there is a substantial precedent for it in broadcasting, cable, and many other areas of communications information.

MR. PATRY: So, then it would be okay for the mutilated versions quote, unquote, to be distributed as long as the other versions were available too?

MR. SAPAN: Yes. I think that access to the original -- real access, not existence, is the ultimate goal; and that colorized versions are not the best way to go, but the critical issue is access to the original.

MR. PATRY: Through video cassettes or broadcast, or does it matter?

MR. SAPAN: I think that whatever is -- and I am not providing a specific answer for medium. Whatever is utilized by a great number of people, whatever technology at a given point in time is what's important; and that's where the access needs to be assured.

MR. PATRY: That's TV most likely?

MR. SAPAN: Not necessarily cable TV. It could be video cassettes, or it could be some other form of distribution.

MR. PATRY: Which is what Turner is doing, putting things out in black and white and color?

MR. SAPAN: Yes. I guess I don't know if everything is released in black and white and color, or given equal shelf space, and the marketing behind them and access is good in each case.

MR. PATRY: And the fact that black and white cost less than the color, as is the case for many of them, that would be incentive to buy the black and white?

MR. SAPAN: I think that is very reasonable.

MR. PATRY: And if they don't buy it?

MR. SAPAN: I'm sorry?

MR. PATRY: And if they don't buy it, and it sits on a shelf because people don't want it, then what are you going to do about access?

MR. SAPAN: We will go hit them.

MR. PATRY: I will leave it on that.

MR. OMAN: I find the irony in this discussion is, that if this had taken place in the early '50s, and if film purists had prevailed, we would all be watching motion pictures in the way motion pictures were intended to be shown and not on television. You would be in a different line of work than you are today.

MR. SAPAN: I guess I don't think the issue is quite that simple. I understand where you are coming from it, but it seems to me the issue is a little more complicated than free market or no free market.

It's a question of free market with guidance, and some sort of restraints and constraints for free market absolutely without check.

Let me turn it around seriously, because I understand why you would suggest what you suggest.

Is it not the case of the real estate developer and owner, absolute outright owner to the deeds of a piece of property, that I should be free, unrestrained, and unrestricted to do what I want; because if I serve -- if I

serve the consumer interest and I go for the free market, that I should be able to construct whatever interest serves and exploits the markets fully?

Any restriction or restraint on that is counterproductive, and countered to the free market, and is a censorship of my action and my ownership that is withholding my rights.

If that is so, then there should be no historic preservation. There should be no landmark preservation; and is that -- would you agree with that? Do you think the landmark and historical preservation are anti-American?

MR. PATRY: They don't work to reproduce buildings -- maybe very small ones, but certainly not large ones.

MR. OMAN: As far as I know, the Library of Congress is not preserving the original building in its archives someplace in its warehouse.

MR. PATRY: Maybe somewhere in Landover.

MR. OMAN: Thank you, Mr. Patry.

Mr. Schwartz.

MR. SCHWARTZ: I want to ask a question along the same vein, because there is still something I don't understand. I understand the point you are driving at. But if there is a businessman, who has already paid the price of transferring his films from nitrate stock to safety stock, and there are administrative costs for upkeep, even if they are not great, why should he care if some people want it in black and white in addition to the color version?

Assume he sells many black and white films because they are available. As long as they are there, wouldn't he want to sell whatever

product he can especially since they are cheaper for him to make, and he doesn't have to spend \$300,000 to colorize it? Why should you care?

You worry in your statement about five years from now having an access problem to original black and white works.

Do you really think that at one point you would ask for a film and be denied? That you couldn't get it and a colorized version would be pushed on you in some way?

MR. SAPAN: Yes. I think that is a likelihood, in fact. I think that it's very possible that in the next five years with colorization, black and white movies will be relegated to hard -- difficult to find in outlets; and that the ability for the next generation, if you will, to experience those films will be very limited.

It will take -- if it were preserved and available somewhere, it would take a act of some time and maybe expense to go find it and the availableness of it.

MR. SCHWARTZ: Wasn't most of the expense of preservation already done in the transferring of the film?

I mean, if Turner owns the entire MGM collection and owns the Warner Brothers collection prior to 1950, and they have already transferred those films, even if they are sitting on the shelves gathering dust, they are still there.

If somebody wants them, why would they not make them available?

MR. SAPAN: If the demand was not sufficiently widespread to cover the costs for distribution, to whatever was then the most popular outlet for

consumption, be it video stores or cable outlet, they could very reasonably not find their way into that distribution mechanism.

It simply might not be worth the money.

MR. SCHWARTZ: Then who picks up the cost of making that accessible? I mean I guess that's the question Mr. Oman asked.

I think Elliot Silverstein in his Directors Guild testimony made a very eloquent point when he said, about the owners of copyright that they have the right to buy, sell, show, not to buy, not to sell, not to show a work; but he believes they also have a moral component, a custodial responsibility to pass these works on to the public. The problem is that costs money to do, and why should these businessmen be forced to do that?

Do you think the Government should be in the business of making available films that aren't otherwise available? Is that what you are suggesting?

MR. SAPAN: I think there are a number of ways potentially to structure a business system, that would insure access to the original intended version of the film. I don't know that I necessarily have all the answers for that.

MR. SCHWARTZ: That's the choice. It's either the businessmen do it, or the government must do it. The suggestion I am making is, if it doesn't cost private owners money to have that custodial responsibility that they have because they have already preserved the work by, transferring it from nitrate stock to acetate, then as businessmen, why won't they make money on it by making it available to people like you?

What I don't know is, is there a second or a third, or other markets available like yours? There might not be a market for these works and my question is, how do you create a market -- I mean, how do you get a younger generation of people interested in films that they are not otherwise interested in?

MR. SAPAN: I guess the first way that occurs if we look at -- to use my analogy, if you don't mind for a second, literature; and it may sound like I am putting too much importance in the films, but I think the classic films in American art are somewhat akin to great American literature; and I guess what it -- it's a little different than most going through books in the school system, as most students buy their books when they are given a curriculum.

Certainly in the school systems, inasmuch as the Government plays a role there -- sees it is very important for people to be exposed. They need to read those books, and that the teachers and the people who create the curriculum, inasmuch as I understand it, don't find it acceptable they read those condensed versions.

So, how does it occur? How do we defacto make it happen?

I am not entirely sure. There are a number of things that I guess are done with businesses like percentages of the gross for business, or percentages of the margin of the business as opposed to the gross, to be sure it's off the profit line that goes to some other piece of activity. That insures that that series be made available.

That's something that has been done historically where free

enterprise have been mandated to insure the existence of something else. I am not sure that is the most realistic approach, but that is certainly one.

MR. SCHWARTZ: My last question, just to change the subject for a minute, is about the grey scale in colorized works. I don't know if you were here this morning when I asked the question of the three colorization companies, who gave us a demonstration of turning the color knob down on a TV set.

I asked the question about whether or not the gray scale is the same as what you ordinarily are seeing on the TV. Whether or not at least in the beginning of the process when they transfer print to video tape, they don't have to wash out the darkness for the video tape some. In the early beginnings of the process, some people have suggested that they did that in order to colorize the tape.

Nothing has changed on print, but the question is whether or not the tape you are seeing, when you turn the color knob down is the same gray scale, the same contrast as what you would ordinarily exhibit when you show a work on television in black and white.

MR. SAPAN: I guess I don't think I have a great answer. My understanding is that some of the -- that it's not as good, and that's my understanding. I am not sure. I wasn't in the room at the time, so I can't comment on that.

MR. OMAN: It's not as good perhaps, but it certainly--quantitatively speaking--is almost identical compared to what you get in the theaters.

MR. SAPAN: Certainly not marketing the differences.

MR. OMAN: Ms. Schrader.

MS. SCHRADER: I don't have a question, but maybe you can satisfy my curiosity. I couldn't identify the film excerpt.

MR. SAPAN: "Top Hat."

MS. SCHRADER: Okay. Thank you.

MR. SAPAN: Can I turn the question back?

Did you like the disco version?

MS. SCHRADER: I am not the one to ask.

MR. SAPAN: Do you think the disco version is a good --

MS. SCHRADER: I am a fan of Astaire, but I couldn't identify the particular motion picture.

MR. OMAN: Mr. Flacks.

MR. FLACKS: Thank you.

Just to see how far we can go with the historic preservation of architectural analogy. Precisely because use of a designated structure is so severely inhibited, a substantial period of time has to elapse before a building is designated a historic structure. There aren't very many buildings designated.

Does a lot of that apply to protection of black and white films with respect to colorization?

MR. SAPAN: I think the answer has got to be yes.

MR. FLACKS: So, what you are really interested in is finding some way to protect a more limited, more widely recognized classic black and white against colorization?

MR. SAPAN: I think that's true.

MR. FLACKS: Is the solution really to prevent the colorization of it, or to attach to the colorization of it certain conditions that may largely relate to access to black and white, rather than creating actual property rights in directions?

MR. SAPAN: I do think that it is the question apart from the moral rights issue. If you look at it socially, or greater society, it is about access; because that's what really defines what people's experience would be.

So, I think to answer your question, access is what ultimately needs to be the thing on which legislature would control terms.

MR. FLACKS: What you seem to be somewhat gingerly saying is that the people who own copyright in black and white films and colorized versions of the films will warehouse the black and whites, so, that people like you will have to buy the colorized films, at least for a substantial period of time, or until they recoup rights.

It's not in their interest to try and market both as fully as possible?

MR. SAPAN: It may be, but the concern at least for the American Movie Classics is -- as much as I can perceive immediate future -- is there is not one sole, believe it or not, at least as it relates to AMC; and my position is, it is not an immediate concern because we have a large library of films black and white whose licenses extend over the next five years.

I think the concern has to do with -- not so much with our ability to get them, but with whether they will really be accessible to people in eight

years from now. I think it is very foreseeable that they wouldn't be around; that they would be very hard to find.

MR. FLACKS: Thank you.

I want to make one more observation more about architecture, which is that I was struck by the fact that much of the testimony, which we heard from the people regarding colorization, is that it in a positive force, respect to enhancing understanding of the artistic qualities of black and white films.

You could simply say that colorization is what architectural historians would call "adaptive reuse."

MR. OMAN: A little technical language there.

Thank you very much, Mr. Sapan. I appreciate your testimony. Your full statement will be made a permanent part of the record, and we may have some further questions for you.

MR. SAPAN: Great. Thank you.

MR. OMAN: The next witness will be the distinguished George Stevens, Jr., film and TV producer and director and writer, and John Belton from the Society of Cinema Studies.

This is the film preservation panel. Thank you very much for coming.

MR. STEVENS: I hope you regard me as distinguished when I have finished.

Having heard the penetrating nature of your questions, I think I will read my statement and resort to the Fifth Amendment.

MR. OMAN: That's your privilege.

MR. STEVENS: Thank you for having me here, panel.

My perspective on this is that we meet here to consider that perpetuation of American culture. Our concern is with the evidence of our times that we humans leave behind, that characterizes our civilization as has been the practice of mankind since men scratched primitive drawings on the cave walls.

We despair when great cities are obliterated by uncontrollable acts of war or acts of God or by neglect. We should despair also when a nation allows the degradation or distortion of the artifacts of its culture.

Since we are talking about continuity, I would like to organize my testimony by recalling the time when my awareness was awakened with a question of lasting quality of works of arts, perhaps later in life than they should have.

It was in an automobile driving home from the 1952 Academy Awards in Los Angeles. The driver was my father whose film had been honored that night with many awards, including his for best director.

The Oscar was on the seat between us and I was 17 years old and quite excited, perhaps too excited in my father's eyes. He turned to me and said, "You know, we will have a better idea of how good a film this is in 25 years."

Ever since that night 35 years ago, I believed in the test of time as the ultimate measure a motion picture is worth. That belief caused me to become passionate about the importance of preserving films of this culture, and inspiration and entertainment for future generations.

I speak to you as a film maker and a member of the Directors Guild of

America, the Writers Guild of America, and as a founder of the American Film Institute.

My views I express are my own, and not necessarily those of the institution of which I am associated.

I believe simply that we have a responsibility as citizens of a great nation to preserve the records of our time, and to insure that our motion picture classics continue to exist and to be shown in the form that their creators devised for them and only in that form.

I know that disbelief lies in the face of the intentions of some of the managers of the corporate interest, that produced or that have acquired distribution rights to these films.

This is not surprising when you consider that a generation ago, many of companies that produced these classics chose to melt down the original negatives, so, to rescue the silver nitrate on them, which they calculated to be more valuable than the films themselves.

It is a sad fact that the movie making system, which is a shotgun wedding between arts and commerce, that the men who have controlled the purse strings of this industry were with very few exceptions so concerned with profits, that they neglected their responsibility to the art and culture contained within the property they managed.

It is this tradition of shortsightedness from which we seek to protect our culture and the American public.

We may be fortunate that many of today's leaders to the motion picture companies, are young executives who study and appreciate the history of movie making.

I believe that they may be persuaded by reasonable argument and self-interest to guard their heritage, rather than distort it for relatively small gains.

I think we all agree that an enlightened nation protects its history and its culture. So, we find ourselves here today considering how to save America's motion picture and television heritage from the ravageness of colorization, panning and scanning, and the truncating of films for broadcast on television or cable.

This is a subject of special concern to those of us who have, over the past two decades, fought sometimes against the neglect and disinterest of the copyright owners themselves to preserve America's film heritage.

Those of us involved in this campaign did it not for financial gain, but in the interest of history and of our children, and our children's children for whom we wish to insure the opportunity to enjoy these preserved films in the future, if they are not so mutilated so as to prevent them as being seen as they were conceived by their makers.

I confess my concern is for what I regard to be the classics or the great films. However, that is a matter of taste. My taste is distinct from someone else's.

It is the principle, as people at the Library of Congress know well, of archival preservation that as much can be preserved is preserved, so, as to provide viewers of the future the opportunities to see it.

The United States of America has found a new art form in this century, and brought forth a film making tradition consisting of great film makers and great films unmatched by any nation. This era is known the world

over as the golden age of movies, and it encompasses works of artists like G.W. Griffin, Charlie Chaplin, Harold Lloyd, Buster Keaton, John Ford, Orson Welles, William Wyler, John Huston, Frank Capra, Billy Wilder, Alfred Hitchcock and George Stevens.

The accumulative work of these men and others less in reputation, may prove to be the most vivid and unique visual, social, artistic records of any nation in the history of mankind.

How foolish we will be if we allow this legacy to be colored, panned and scanned, and truncated so that the future generations will not see these works in the form they were originally conceived.

I believe that the reason that the work of these men is valued today half a century after it was created is, because they were strong -- they were the strong and talented ones who fought for it, and had the authority to make their films in their own vision.

So, it is important that their vision be the one that is preserved and the one that is seen, not the vision or the access of vision of the higher technicians that engaged to coat these films with color, or alter every single frame by panning and scanning, or to delete scenes to enable the films to be sandwiched in between commercials and fit an arbitrary time period. No nation with any sense of history or sense of artistic tradition would allow that. We as a nation have chosen to dedicate the remarkable invention of television to be an advertising need.

It can be argued that our system is a good one in principle, but is it right that all art and creativity in films should be subordinated to the

desires of the advertisers who have done broadcasting, and their practice of possibly the unchecked distortion of our finest films?

Is this consistent with their obligation to use the airways in the public's interest, convenient and necessity. I hope the answer is no?

As a great democracy, we must have within our powers the capacity to devise the needs to balance the economic appetite of copyright holders, and broadcasters for the public interest.

We must find a way to protect the black and white films of Griffith, Chaplin, Lloyd, Keaton, Ford, Welles, Wyler, Huston, Wilder, Hitchcock and Stevens from being colorized by technicians.

These great film makers designed these films with acute visual sensitivity to the shades and textures of black and white photography. Those that claim otherwise are simply ignorant of the creative process.

Second, there is an alternative to panning and scanning. The so-called letterboxing technique enables films to be presented in their true aspect ratio on television, without the distortion of each frame by panning and scanning.

Audiences will, particularly as the resolution of television sets improves, quickly adjust to the dark spaces at the top and bottom of the screen, and appreciate the preferred experience of seeing scenes as they were composed by the director and his cameraman.

This practice, already popular in Europe and Japan and insisted upon by Woody Allen for his films, should be adopted in the United States.

Third, the public deserves limitation on the amount of commercials that may be inserted in movies on television.

In the time I have been producing programs for television, I have seen the amount of commercial time and network hour increase from 6 minutes to 14 minutes.

In the name of deregulation, we allow the unchecked commercialism and cluttering of television, news breaks, sports breaks, station breaks, promotions of up coming shows and commercials, without regard for the interest in the viewing pleasure of the American public.

The amount of clutter is even greater on off network television.

As long as we permit broadcasters to think of motion pictures as sausages, that can be cut up and parts thrown away so as to that make them fit between expanding the amount of commercial material, we will be showing a lack of respect both for our public and for our film heritage.

Some people, particularly the colorizers, like to say that these film makers would have made their films in colors if they could have afforded it.

In the vast majority of the cases that is simply untrue. In those cases where it might have been true, the film makers would have applied their own distinct sense of cinema to the choice of costumes, make-up, sets, and most importantly the design of the photographer.

Their vision is but one quality that distinguishes them from the technicians who hire out to colorize their work.

John Huston and Frank Capra and Billy Wilder lived long enough to observe the insult of colorization to their work, or the impetus as Mr. Huston called it, and denounce the technicians who distorted their work.

I knew most of the other film makers named herein, and I can assure

you there would be storms in the heavens if these versions of their work seen were in the great projection room in the sky.

One of these men dedicated himself on these matters before passing on. He declared himself. Excuse me.

I have located a transcript of a press conference of George Stevens, Senior held on October 26, 1965. At the time he sued Paramount Pictures and the National Broadcasting Company in the Los Angeles Superior Court, charging them with violation of his contractual rights that assured his film "A Place In the Sun" not be cut, edited, or altered in any way without his expressed consent.

He referred to this alteration of this film as a matter of conscience and a matter of responsibility. You will bear with me if I read an excerpt from his words.

He said, "Certainly a film and the audience's relationship to the film is a consciously designed trend of thought. I am concerned with my responsibility of my work and the individual's right as the audience to be treated as a thinking responsive mind, and not just a device to be moved by the extraordinary skillful figures in the commercials.

"Insertion of some 35 skillfully received skits in my film "A Place in the Sun" leaves the film hopelessly disjointed, leaves dislocation of the film for its purpose. It's purpose being to have an association with its audience and a continuity from beginning to end. The film becomes just a device thrown in to hold their interest.

"We hope that through this lawsuit and other efforts of its kind, we can do something to let it remain a conscience at work of the film, and the

responsibility to the audience; and from where I sit and what I see, I don't think the great television broadcasting people acknowledge that or care about it."

That was a plea from a man who devoted his life to making films, and providing the enlightenment and entertainment of quality and value to the American people.

So, I raise his voice once again today along with my own, to urge that we as a proud nation begin a process to safeguard our great motion pictures, and protect the interest of the American people.

The words of President Kennedy are carved into the walls of our natural cultural center down the street, express our responsibility I believe with eloquence.

He said, "I look forward to an America which will not be afraid of grace and beauty. I look forward to an America which commands respect throughout the world, not only for its strength, but for its civilization as well; and I am certain that after the centuries have passed over our cities, we too will be remembered not for our victories or the defeats in battles or in politics, but for contributions to the human spirit."

So I say to us today, let us look for and find the means to safeguard our contributions through despairity.

Thank you.

MR. OMAN: Thank you very much, Mr. Stevens, for your testimony.

Mr. Belton, should we call on you at this time?

MR. BELTON: I am speaking on behalf of the academic community, particularly the Society for Cinema Studies, which consists of a little more

than 650 members who teach film and history, and also has a sizable student membership.

The central character of George Orwell's 1984 is a technological bureaucrat who sits at a desk and punches information into a computer. Following the specific orders of his superiors, he retrieves information from the past and alters it according to the latest party line of the totalitarian state government.

As scholars involved in the transmission of film history to present and future generations of students, we regard the practices of colorization, panning and scanning, and lexiconning as tantamount to an Orwellian re-writing of film history.

The existence of these bogus works makes our task as educators all the more difficult. Before we can teach film history, we must first re-educate students who have grown up watching big brothers distorted version of it on television.

We view colorization, panning and scanning, lexiconning as practices which have been determined by the needs of the growing television, cable, and videocassette industries for entertainment software.

The standards and norms of the television, and video, medium have been imposed willy-nilly upon the quite different standards and norms of another, the picture industry.

Thus, because all television programming, at least since the mid '50s and 60's, is in color, all films shown on television must be in color, even though most of the films made before the 1950s were made in black and white,

and even though, until quite recently, a number of new films continue to be made in black and white.

Because the dimensions of television screen have an aspect ratio 1.331, all films shown on television must have the same aspect ratio, even though virtually everything made since 1953 through '54 was filmed in one of several wide screen aspect ratios ranging from 1.66 to 2.66; and because television programming traditionally involves fixed time slots of 30 minutes to two or three hours, films must be adapted to fit into time slots.

As a result, they are cut, added to, and/or lexiconned.

Explain it. The impetus for colorization comes from the advent of color television, and introduction of a two-tiered system in rental rates for motion picture films shown on television.

Though black and white films continue to be shown on television since the 1960s, television broadcasters pay more for color than for the black and white films.

According to this system, the dubbed color version of a Japanese monster picture automatically provides its distributor with a higher rental than would "Casablanca," "It's a Wonderful Life," or "Night of the Living Dead."

The practice of panning and scanning derives from the refusal of network television to show films with a black masking above and below the image.

The use of masking would preserve the composition of the original widescreen film, but because it does so at the cost of diminishment of the overall size of the image, leaving the TV screen unfilled as it were,

masking or letterboxing was rejected in favor of a process whereby the widescreen image is successively recomposed by a camera, which scans the width of the image, producing a TV sized image possessing full height, but missing the sides which have been cropped off.

Lexiconning is used to expand or compress the running time of a film or TV program usually by as much as ten percent, compressing or expanding two hour films by as much as 12 minutes.

Lexiconning is done in order to fit a film into a longer or shorter time slots, and/or to permit the inclusion of additional commercials without cutting the content of the program.

The length of Alfred Hitchcock's "Rear Window," for example, was increased via time expansion during the credit sequences, and the addition of flashback sequences pulled from footage that appeared elsewhere in the film.

The last time I taught the film, there was some complaint that the version shown was incomplete, lacking the flashbacks which they had seen when it was shown on television.

This is precisely the sort of confusion that the alteration of original works introduces into the study and teaching of film history.

In each of these instances cited above, colorization, panning and scanning, lexiconning, are adding footage. An original motion picture was materially altered in order to accommodate the temporal format of a different medium, television.

With the exception of colorized films, these films bear no credit acknowledgement that they have been altered.

Though the Society for Cinema Studies opposes the material alteration of any film, we feel that if a film has been changed in any way for television or video distribution, that the consumer is entitled to know what they are seeing is not the original work, but a derivative version of it.

Panned and scanned films ought to bear credits advising viewers that this film has been recomposed for television and video.

The names of the companies and the technicians involved in the panning and scanning process ought also to be listed. The same restrictions ought to be reserved in the case of lexiconning. Colorized films ought to include a similar list of individuals involved in the colorization.

These new technologies have had an impact not only on the past film history, but they also exert such upon present production practices, and threaten to change the shape of the future of American cinema.

I am going to panning and scanning since it's been around 25 years.

During the late 1950s and early 1960s, the sale of relatively recent feature motion pictures to television became an economically crucial component of the distribution system.

In 1961 and '62 motion picture studios developed pan and scan systems, so, that they could sell their films -- the CinemaScope libraries to television.

At around the same time, the American Society of Cinematographers issued a series of recommendations to its members, advising them to compose their widescreen images for television's "safe action area."

Camera manufacturers began to produce viewfinders which indicate this area with a dotted line, and cinematographers began to protect their compositions from television by keeping the essential narrative and/or aesthetic elements within this frame.

By keeping all crucial story information in the safe action area, cameramen adapted their art to satisfy the demands of the television screen and the needs of panning and scanning.

The extreme wide screen compositions of the 1950s which exploited the full width of the frame, often placing figures at either edge of it, gave way to conservative compositions characterized by dead space on either side of the central area of interest in the frame.

Indeed, cinematographer Nestor Almendros openly acknowledges that today cameramen generally avoid compositions that exploit the extreme edges of the frame.

In fact, the threat of panning and scanning for television has taken its toll on widescreen aesthetics. Much as certain senses that remain unused eventually atrophy, the artistry of widescreen composition has gradually gone the way of the dinosaur.

One way directors and cameramen can protect their composition is by filming in aspect ratio closer to that of television. They are not shooting films in CinemaScope, Panavision, or 70 millimeter.

Director Martin Scorsese, though he has made a number of films in 1.85:1 and 1.66:1, has never made a film in scope, though he confesses that he would dearly love to do so.

He has explained that he has avoided shooting in scope because of what would happen to his widescreen compositions when the film was panned and scanned for broadcast on television.

Though the option of filming in scope remains, the knowledge that an increasingly greater percentage of a film's total audience will view it on a TV screen rather than in a theater, has led to the more or less tacit acceptance on the part of the film industry of a new standard, that of 1.85:1, a standard that is more compatible than scope with the demands of the television screen.

As a result, film makers have become more and more limited in terms of the range of aesthetic options available to them, and consequently film has become more and more impoverished as a medium of expression.

Like the invention of panning and scanning, the advent of colorization has dramatically changed the conditions under which new motion pictures are produced, posing an indirect threat to creativity in the industry.

Knowing that a subsequent owner of his or her film might choose to colorize it if it were made in black and white, a colorization era film maker can only protect his or her work from that sort of alteration by filming it in color in the first place.

We suspect that as a result, fewer and fewer black and white films, films such as "Manhattan" or "Raging Bull" will be made in the future.

Rather than creating new options for film makers, colorization closes off options, potentially eliminating any future in black and white.

As traditional distribution patterns change, and as a greater percentage of a film's income derives from sale to cable TV, or from the sale of prerecorded videocassettes, both the kinds of film that will be made and the way in which they are made will be increasingly determined by the video market.

A recent study conducted by the Wilkofsky Gruen Associates for Merrill Lynch predicts that by 1995, the sales of prerecorded video cassettes will reach 2700 million per year mark, amounting to over 14 billion dollars in sale.

They forecast that total 1995 prerecorded cassette sales and rentals will add up to 20 billion dollars, although the theatrical box office in 1995 will take in revenues of only 8 billion dollars.

In other words in 1995 by that time, video revenues will come to almost two and a half times that of box office revenues.

MR. OMAN: Mr. Belton, I know you are not accustomed to speaking in 15 minutes time blocks, but we do want allow time for questions in the end.

So, if you can summarize in the next five minutes, we would be very grateful.

MR. BELTON: Fine.

Video? Individual distribution has effectively killed off certain other forms of motion picture enterprise and industry, second run houses and revival theaters.

One major Manhattan house discovered that the store video store across the street had gotten a hold of their schedule in advance, ordered all these video tapes that were to be shown on their schedule, and had

advertised them as sort of a bargain. Why pay \$5 when you can rent these films that are being shown at this theater and see them at home for half the cost, effectively forcing this theater to become a first run theatre.

Yet the community of course relies heavily on revival houses for making films available to us for study, and study of our student.

The sale of television -- the sales to television and distribution on video constitutes an increasingly significant percentage of a film's total revenue. Films that do not satisfy the mass audience I think will not be made.

Recent trends toward production of genre films addressed to a teenage market such as horror films, gross-out comedies, and beef-cake action adventure films, leads us to suspect that future film making will be increasing constrained by the demands of this exploitation market.

One argument that is generally made by colorizers and by others involved in the material alteration of motion picture films is that their activities in no way endangers the original work, which remains intact.

This sort of indicates as I mentioned that colorizers have preserved films in their libraries.

What concerns me in particular is film availability. We don't have access for educational purposes to motion picture films.

During the past few years, according to Doug Lemza of Films, Inc., over 80 percent of American non-theatrical distributors have gone out of business, ranging from giants like Audio-Brandon, MGM/UA, et cetera, to the small mom and pop outfits.

Medium sized companies that have survived have witnessed a 75 percent drop in business. They have only survived by their videos. There are only today two media sources for 16 millimeter films.

As rental libraries have changed hands, they have also been consolidated, and a number of titles have disappeared.

At the same time, a number of anamorphic films are available only in panned and scanned TV versions, making it impossible for educators to teach courses on widescreen studies, for example.

I have a list of films which have been eliminated, but let me move on to essential problems.

Archives are of little use to film educators and scholars. With the exception of the Museum of Modern Art, American archives do not make films available for classroom rental.

Though scholars are permitted to study films in archival collections on the premises, more and more archives are providing scholars not with the original film, but with video cassettes of the film. The Library of Congress and UCLA Film Archives have adopted a policy of making films available for viewing on video for these scholars.

It is impossible to use video to study certain aspects of motion picture art. A video has something like 350. Thirty-five millimeter film has the the equivalent of 3000 scan lines, which of course is not at all available to us today. Contrast ratio are extremely different -- 35 millimeter motion picture and video image is 300 to 1. That for an image on television is only 30 or 40 to 1.

The disappearance of nontheatrical films in circulation will mean that, future generations of film makers will be trained in a new canon of film classics. Box office successes and a handful of enduring classics like "Citizen Kane" and colorized versions of "Casablanca" and so forth, but the training of our future film makers is of extreme importance and concern to myself as an educator and to everyone here, because it determines the future levels of our film culture.

Okay. In an attempt to address this problem, the SCS would like to propose a creation of a national film clearing house, established in conjunction with archives, non-theatrical distributors, and members of the academic community. This clearing house would give educators access to films for educational use. This clearing house would provide lists of unavailable titles normally used. It would provide funding for striking of prints, supply films for classroom use only, and oversee the payment of rentals for these films to the distributors or producers who own the rights. This clearing house would be funded through a tax levied on the sale of blank video cassettes, and on the sale and rental of prerecorded video cassettes. This tax might also be used to fund American archives engaged in film and television preservation.

In conclusion, the film academic community sees the teaching of film history and the transmission of our American film heritage to present and future generations threatened by the new technologies of colorization, panning and scanning, and lexiconning.

We find that more and more young students must unlearn what they

learned about the history and the art of American motion picture by watching films on television.

At the same time we find it increasingly difficult to do this, given the decline of repertory exhibition and non-theatrical distribution.

If steps are not taken to protect our films from the new technologies which alter them for television, we can only predict a course of decline in the standards of American filmmaking in the future, an increase in the visual illiteracy of American culture as a whole, and a demise of one of our nation's greatest art forms.

MR. OMAN: Thank you very much.

We have a question for both of you, so, if you would remain at the table for a few moments.

I was curious, Mr. Stevens, about the outcome of that court case where your father tried to enforce his rights in terms of the editing.

Did he prevail?

MR. STEVENS: He lost.

MR. OMAN: On contractual grounds?

MR. STEVENS: On grounds the judge I think faced the question of whether he would say that a great national network would not be allowed to put commercials into his film, even though his contract called for it. It was a more extreme act than this judge was up to.

MR. OMAN: That was under California law?

MR. STEVENS: Yes.

MR. OMAN: I also wanted to ask you about the contention you made that the distinguished directors that you mentioned in your list, including

your father, would have chosen to make many of their films in black and white even if the technology for color had been available.

Would the producers have given them that option do you think?

MR. STEVENS: These men didn't work for producers. They made their own films.

MR. OMAN: Would the same argument apply to directors who had grown up in the silent era, they would continue to make their films as silent films rather than sound?

MR. STEVENS: I don't think so. I think that was clearly a change in the technology. I will give you two examples.

I worked with my father on a film called "The Diary of Anne Frank," which was made in 1958, some 20 years after the easy availability of colored film.

He made "A Place in the Sun" when the Paramount was making many pictures in color. It was clearly a film to be made in black and white.

He made "Gunga Din" in black and white. All things being equal, he probably would have -- he might have chosen to make it in color; but he would have made it, and Joe August the great cameraman would have lit it very differently than -- I mean, there is a different technique for lighting -- for color in lighting than for black and white, shades of gray in black and white. This it is a totally different approach to a cinematographer.

Also, that parenthetically, there is a process of making black and white prints. You can make very neutral prints lacking in contrast or lacking in subtleties in shadings of a great director.

I could make you a very bland print of "Citizen Kane," and the studios tend to lose interest in the care and grading of prints, particularly those in black and white which no longer have a large market.

So, I would be very wasy if someone showed you a print of black and white film that has been prepared for colorizing, to make certain that this is shaded and graded in the way that Orson Welles or Alfred Hitchcock or George Stevens would done it when they were at the helm.

MR. OMAN: Is there any middle ground that you can see where works could be edited for television and other non-theatrical media, in a way that would meet with the director's approval?

MR. STEVENS: Well, I am not aware of the complexity of this question, and I said as I speak mainly for protecting what I regard as the classic films; and those films are -- become incoherent when they are edited simply for the purpose of squeezing them into a shorter time period, changing the tempo, and the connection between scenes in order to insert ever increasing amounts of commercials.

So, in this complex area, I think my first concern is for those films that will become an important part of American's film heritage, most films that touch Mr. Belton and the growing numbers of educators across the country are using in classrooms as he suggested, the films that become the inspiration for the filmmakers in the future.

How would Francis or Martin or David Lynch develop their insights in the filmmaking if the film is on television, where they saw it mostly by George Stevens and John Huston and Alfred Hitchcock and D.W. Griffin and Charlie Chaplin.

We are distorted by the imposition of color. They would have no sense of it, and David Lynch would have not made the beautiful black and white film "The Elephant Man."

MR. OMAN: Thank you very much.

I ask Mr. Patry to take the floor.

MR. PATRY: I have no questions for Mr. Stevens.

MR. STEVENS: What a relief.

MR. PATRY: I have a few questions for Mr. Belton.

On page 8 in your testimony you talk about the idea that the names of the companies and other technicians involved in the panning and scanning also to be listed.

Is that -- will you explain the reason for that? It is kind of like a badge of shame that you want to compose?

MR. BELTON: No. Milos Forman suggested that, because in the Hollywood industry, which is a collective industry, everyone receives credit for the work they put into the film. They are very proud of the credit they receive on the film.

This subsidiary industry is developing, and we ought to acknowledge their work. They haven't made a contribution to the film. They are negative in my estimation, but I believe that if we look at the down side of this, if we are going to live for another 50 years or longer with colorization, panning and scanning, lexiconning, at least it ought to be better.

I think there might be some pride in the craft if the names were

listed. It would also provide a consumer information label, so, that we would know more clearly that film has been altered.

MR. PATRY: What consumer interest is there in finding out who the art directors were in a particular colorized film? Are you saying you want to require this, or if want it they can put it on?

MR. BELTON: I think it ought to be required. This is -- again most motion picture credits are fairly extensive in acknowledging the activities of the people who have -- who have worked on the production.

MR. PATRY: That is voluntary. In fact, everybody wants their name to get proper credits.

MR. BELTON: Why would they not want their names on these films?

MR. PATRY: My question is the reverse.

Why do you want it put on there?

MR. BELTON: I think it makes it much clearer for the consumers to see that this is a separate stage of production, involving a separate list of credits, that will remain sort of distinct from the original credits; but which in some way will identify the film, and give the consumer a choice.

MR. PATRY: That is above and beyond a label along the lines of Film Registry Board? That's not sufficient? A label saying this film has been colorized --

MR. BELTON: This is above and beyond that. I think it should something above and beyond that.

MR. PATRY: You gave the example of a revival house that was showing certain films, and then the video store across the street or close proximity got a list of the titles that it was showing, and then advertised why pay \$5

when you can watch the movie at your convenience.

My question to you is, what was the revival theater offering? You say the videocassette store really only appealed to those popular sort of first run sort of movies; and my question is, if that's all the revival house is showing is films that are already on videocassette, what was the big shake?

I will preface that. I own a letterbox copy of Woody Allen's "Manhattan" myself, and I would go, in fact, to a revival theater to see the film on widescreen because it does present an obviously different experience; but I mean that's all the revival houses are doing. That might be some explanation for why they are making them.

MR. BELTON: I don't have a copy of the exact schedules that were used in the revival house. There are a finite number of film classics that revival houses show repeatedly, and many of these films are certainly available in the video tape market.

I would argue with the consumers if for example we are talking about "Hidden Fortress" -- let's pick something else. Say the revival house is showing "China Town."

They would be showing it in 35 millimeter cinemascope, and the video store across the street which would have a video tape panned and stand scanned.

They are not saying the video tape has been panned and scanned. They are saying this is as good as what you are going to get from the theater, and the public has no way of deciding or making the decision that this video tape is not going to be as good as what we see in the theater.

Unfortunately, the economic competition resulted in the demise of that particular kind of theatrical exhibition situation.

MR. PATRY: I would certainly know that a video cassette I am getting is different than what I see on a bigger screen.

Something real quickly. I know we are out of time.

Your proposal for making 16 millimeter available which is putting tax on prerecorded video cassettes and other things.

Are you saying it's okay to have panning and scanning and colorized things distributed as long as there is a tax on them that goes to fund the other things, the 16 millimeter formats; and if so, how are you going to make the producers come up with the 16 millimeter format?

I mean, it's not there. How are you going to get somebody to market it?

MR. BELTON: My statement says whether it's okay to have panning and scanning versions of video cassettes in distribution. I don't know whether the academic community can decide on a matter of principle in law. That is difficult.

I would like to address the problem we face in educating films goers and filmmakers.

These -- we are very, very interested in cooperating with Ted Turner who owns the rights to many of these films that are no longer available to us. So, that we would like to involve every element of the marketplace, archives, distributors, producers, in making films generally available; not just available in the archives, but available in the

classroom and for theatrical distribution for those houses which won't have these available.

To generate 16 millimeter negatives is extremely expensive if there is no negative in existence.

So, this is why a lot of money through tax is necessary.

MR. PATRY: Those would be prerecorded video cassettes as you proposed, and one would have the panned and scanned video cassettes, so there will be a market to give you the money you need to get 16 millimeter formats that you want; right.

MR. BELTON: Wouldn't that be ironic.

MR. PATRY: That's my question.

MR. BELTON: I am not a legislator. I would tax any prerecorded video cassettes. I am not going to discriminate and exempt taxation from panned and scanned prints, no.

Mr. Schwartz.

MR. SCHWARTZ: I have one question for Mr. Stevens.

First I want to congratulate you on your recent Emmy. I wanted to ask you as someone who has spent 20 years in film preservation the question I have been asking all day; how do you build an interest in a young generation with the demographics working against you, in these films; and what role does the Government play now, and what role should they play in preserving and creating original works?

MR. STEVENS: You are speaking of showing the films in theaters?

MR. SCHWARTZ: In theaters.

MR. STEVENS: I think that that practice will ironically will grow even in the face of the competition of video cassettes and cable, because I think it wets the appetite. As Mr. Patry indicated, he would both have the video tape and go to the theater.

I think it's a complex question, but I think it's much like all the issues we have face here today. I think it is very good that we are meeting and these things are being discussed.

I think there are solutions. I think the panning and scanning question is really just blindness that has kept us from dealing with that. The networks decided that they didn't want to show the panned and scanned films.

I think Roger Mayer is a friend of mine, and we have worked together on things. We have disagreed about things, but I would not be surprised if Roger Mayers would see the value of panning and scanning these films that were preserved under his stay at MGM so that they would be shown in their proper aspect ratio, hopefully without colors.

In the great color musicals in MGM, they look absolutey absurd on television when the dancers keep going out of the frame, and the panner and scanner is trying to catch up and cut to a close up of someone on the other side.

There is an old saying around Hollywood some time ago, the movie goers only react to two impulses. The impulses are terror and grief.

I think the fact that these hearings are being held, the fact that Mr. Stewart came to Washington, the fact that directors come to Washington,

the fact we are here today is having an effect on the custodians of our American films.

I wonder whether black and white versions, as suggested they will be of the Turner films, would be available were it not for the spotlight that has been placed on this question by John Huston and other prominent makers.

I will not get into the question of how readily available those films will be. They certainly will not be available on Turner Broadcast, but we do hope -- I suspect if Mr. Mayer says it will be done, it will be done; that those films will be readily available in black and white.

I read recently in "Variety" that the owner of video 83 in New York Time Square, which gets a good cross section as you would find -- tourists from all over the world, lower class people who work around there, executives who work around there -- the people who want older movies are more interested in buying black and white. I would say 99 out of 100 want the original.

Now, that certainly contrasts with what we hear about the research conducted by the network who broadcast colorized films, and I -- of course it's their research and their network. So, I don't suspect we would get much to the bottom of that.

I think that if reasonable people meet and continue to deal with this, that we can find solutions.

As I said, I think the panning and scanning, you really focus the people in the industry on it, and the video business and television business a great change should be made there.

What does concern me is when we raise these questions and we simplify it. When I hear someone say you want the Government to tell you what you can show.

There are other solutions for that. I have great respect for public service, and I respect you as public servants. I urge you to continue to deal with this issue and seek solutions.

My father lost the case in Los Angeles. Over here in the Supreme Court from 1896 up until the Brown decision in 1954, great advocates went into that court and said to the nine justices, "Do you want the Government to tell your -- to tell a man in South Carolina who his daughter has to sit next to in school."

Year by year the answer favored those attorneys until 1954 when someone decided, "Yes, we want the Government to intervene on behalf of the people that are segregated by race."

I think there are areas here where an enlightened Government and its public servants, can contribute to the this dialogue without interfering too horrendously in the free market.

MR. SCHWARTZ: What do you think about the idea of the Government in the form of the National Film Preservation Board, even though it is comprised of private citizens, choosing 25 films as classics?

I mean, that seems to run against the notion you started out with as a film preservationist that you preserve all films. The moral of the story you told about your father, is that you preserve all films and let time tell what is a classic and what isn't?

MR. STEVENS: My answer to that I guess it's better than nothing, and it certainly is not a particularly enlightened or fullproof system. It's a result of compromise, but I think this is an issue that will not go away.

I think others will be discussing it in the future, and that hopefully we will find a way in our democratic process to safeguard our culture, and the right of citizens today and in the future to see the works of great filmmakers in the fashion of which they designed.

MR. SCHWARTZ: Are either one of you aware of any surveys on the issue of letterboxing. You said the networks make the decisions in this area.

Are any of you aware of market surveys that deal with the public reaction to letterboxing? How they would like it and so forth?

MR. STEVENS: I would say that these great films were made -- nobody -- Hitchcock didn't -- viewer surveys are something that, you know, -- now they make movies based on viewer surveys.

These films that we admire and see were made by people who didn't need viewer surveys.

MR. SCHWARTZ: My question is how can we tell whether or not people like letterboxing. The networks decided that letterboxing is not something that viewers would want to see. But my question is how did they decide that?

MR. STEVENS: I would say probably the same way they decided to increase the amount of commercials from 6 minutes to 14 minutes; either the path of least resistance or without much thought.

MR. BELTON: As I understand it, though the FCC is not involved in this particular thing, -- we are talking about the '60s when this was being brought up -- the networks reasoned that the appearance of black above and below the image might give the home audiences certain indication that they were not receiving a proper signal; and they would be dealing in the broadcasting office with a lot of phone calls.

I don't think they did any experiments in this. So, this was their rationale behind it.

I don't believe that there have been very many network broadcasts of letterboxed films. So, there would be no viewer survey.

The only place letterboxing films existed as a phenomena is in the video sales, and areas that have cable television distribution.

MR. SCHWARTZ. The Federal Communications Commission never issued a federal rule on that.

MR. BELTON: No, they didn't. The FCC said you could transmit letterboxed film if you want, because you are transmitting a full signal. That's fine.

MR. OMAN: Ms. Schrader.

MS. SCHRADER: Mr. Stevens, in terms of specific solutions, you mentioned that of course it would be ideal to restrict the number of commercials that could be inserted in a given hour of television.

Of course you know that is regulated by the Federal Communications Commission.

We might make some recommendations to Congress. I personally have my

doubts as to whether Congress would want to legislate the number of commercials, Congress would probably defer to the FCC on that point.

So, that's just an observation/ issue may still rest in the hands of the FCC commissioners.

In terms of other specific solutions, are you in fact suggesting that there should be additional moral rights legislation at the Federal level, so, that other directors would be able to stop the editing of their films for television, for example, as your father attempted to do in the mid '60's?

MR. STEVENS: I would say that I would hope that the moral rights issue will be further considered by Congress. I am not certain that I have the precise solution to it, but I think it's certainly worthy of airing and continue further airing.

That's like taking the Fifth; isn't it?

MS. SCHRADER: I was wondering if you were inclined to favor such legislation, whether you have considered the possible impact on the production and distribution of films? Whether based on your experience in the film industry as a producer and director and so forth, you feel that the industry could easily continue in a profitable way producing high quality films under a moral rights regime?

There has been some suggestion that, although it's a complex situation, one of the reasons that the film industry in Europe may not be stronger than it is because of the lack of production control that results in fewer films being produced and fewer profitable films.

MR. STEVENS: Respectfully, I do not think that is the reason that European films are less successful at box office. I would say that the only reason in view of some motion picture television industry survived as long as it has is because it's indestructable.

I think it might even survive a certain kind of moral rights legislation, but I do emphasize that I do not have a definition of what the moral rights legislation might be.

MR. OMAN: Would the moral rights that you are seeking go as far as to allow the director to prevent a picture from being shown on television at all?

MR. STEVENS: I really do not have a view as to any specifics on a moral rights clause. I see myself here more as an attempt to protect those whose works are complete and exist for the ages, rather than the moral rights question in the future.

MR. OMAN: Mr. Flacks.

MR. FLACKS: Yes.

Mr. Belton, do you think that federal policy -- national policy in this area should be more concerned with the protection of the work which film artists have created against material alteration, or whether it should focus more on the right of the artist who created the work to control alteration, or both?

MR. BELTON: I wouldn't be adverse to the Library of Congress of course as one of its many duties to preserve motion pictures, and to be a depository for historical objects and to function for us as a film distributor.

The Copyright Office itself on the other hand is involved in awarding -- you know, I would say administering copyright protection to those who own it.

I mean, one of the -- I guess the argument I always go back to is, my understanding -- although I am not a lawyer and there could be some problems here -- one of the basics of the copyright law protection is to encourage creativity. This gives a certain amount of control or exploitation of the work that is performed to that group of people who created it.

My argument is and my presentation is that panning and scanning and colorization have essentially eliminated options for creative artists, therefore to cover copyright protection. Colorization is a similar problem, which I think it was just about a year and two months ago the Copyright Office decided to give copyright protection for colorized works.

I see that as in some ways counter productive to the copyright law. We all know the law can be read in different ways to more fully realize its spirit.

I think that perhaps we could include without legislation of some sort of -- here again the word moral rights -- aspect to interpretation of what copyright protection is doing, without necessarily introducing a moral rights provision of a bill that became law.

It's a matter really of the people who are making the decisions about how works are to be made and consumed.

MR. FLACKS: The proposal in your statement for a national films clearing house, is this its debut?

Is this an idea which you or other educators involved in the film have discussed before, and if so with whom?

MR. BELTON: It has been discussed by the task force on film. I have discussed it also with one or two artists, and that's about as far as it's gotten.

MR. FLACKS: That's all. Thank you.

MR. OMAN: Thank you very much. We appreciate your patience.

I propose a five-minute break. We will be back with the Motion Picture Association represented by Peter Nolan of Walt Disney.

(Thereupon, a recess was taken).

MR. OMAN: If we could resume.

Our witness is Peter Nolan from the Motion Picture Association of America.

Mr. Nolan, the floor is yours.

MR. NOLAN: Thank you, Mr. Register.

Just for the record, I am Vice President-Counsel of the Walt Disney Company, and speaking today on behalf of both the Walt Disney Company and the Motion Picture Association of American.

Before I get to my remarks, I want to state also for the record that we are the copyright owner of the Siskel and Ebert Show, which was shown today without permission, edited and publicly performed.

MR. SCHWARTZ: We were told by the directors that they had gotten permission, because we asked them that.

MR. PATRY: We asked that question.

MR. NOLAN: We didn't agree to have it edited.

Nick Counter who is also supposed to be here today for the motion picture industry, -- he is president of the alliance which is the collective bargaining organization for the motion picture producers -- unfortunately could not make it because of negotiations pending with the teamsters union.

His statement he asked to be put into the record, and he is more than willing to answer any written questions that are submitted to him. We understand that the fundamental issue facing the Copyright Office in this hearing is, whether to recommend to Congress enactment of a federal moral rights law applicable to motion pictures and to television production.

Mr. Register, we along with a lot of other copyright owners, not just motion picture owners, vigorously disagree with this position of the Directors Guild which favors enactment of the moral rights law.

There is one concept I would like to convey that perhaps crystalizes the essence of the rest of my remarks, and that is if it ain't broke, don't fix it.

We are very successful in the motion picture industry, exporting our product around the world. We completely dominate other markets with our copyrighted works.

We think one of the advantages we have over other producers of motion pictures is that we do not have interference with the work for hire doctrine, which is somewhat unique for our country.

I am not saying it's the sole reason, but I think it's a contributing factor.

In our view, moral rights legislation such as H.R. 2400 is neither necessary, nor appropriate for a variety of reasons that I will get into.

Mr. Register, the panning and scanning -- by the way I am not sure if there is a scanning. It's panning really.

The panning and time compression technologies are tools that are very valuable to society. They permit producers such as those that I represent to make their products available to a wide variety of people, wider than would be true without them.

Indeed, that is one of the major fundamental goals of the copyright act, at least as I have always understood it, and that is to encourage for the benefit of society the wide dissemination of original works as possible.

Today motion pictures are delivered to the consumer through a wide and very expanding range of transmission media, from motion picture theater, to free broadcast television, to basic cable, to pay cable, video cassettes, DBS, and a whole raft of other transmission vehicles.

Our works must be capable of being adapted for the particular needs of these transmission medium.

Technologies under discussion today allow for those adaptations to take place, and to encourage the wide dissemination of our products.

When a motion picture is created for theatrical release, the dimensions of the image are those of a typical theater screen.

Theater screens have a wide aspect ratio. By contrast, television has a different one, a smaller one, and it has to be -- the motion picture has to be adapted in some way for the product to be shown on television.

Since 1961, panning has been used to accomplish this means. There were a variety of attempts at other methods, and they just didn't work.

Through the panning process, the motion picture image is adapted so that the entire screen is filled with a visual image; and despite what you have you may have heard from others at this microphone today, we are absolutey convinced that the public would rather see it that way than with a letterbox.

Time compression and expansion facilitate also the airing of these motion pictures on commercial television and on airlines. In the absence of time compression, it would be necessary to eliminate more footage from the original version of a motion picture to meet the requirements of broadcast television and the airlines.

Studios and transfer houses take great care in employing time compression and expansion. They are careful to work with acceptable limits of these techniques, so, that we make sure the integrity of the film to the extent possible considering the transmission media is maintained.

An example this morning was given of Steven Speilberg requiring its distributor in videocassette format to use letterboxing.

That same producer is allowing ET, his biggest grossing picture ever, in fact in the whole industry, to be both letterboxed and panned. Not panned by critics, but just panned for the television set.

The reason for that is, that he wants a wide dissemination of that product. Now, he is very much and was very much involved in that transfer process, to make sure that the panning is correct.

Disney does that as well. Everybody theatrical motion picture we transfer to video cassette, we ask the director to come in and sit and watch

the process, and to approve that process. Every single theatrical motion picture we produce has this done.

The reason for that is twofold. One is that we want the integrity of the film to be maintained to the extent possible given a particular technology.

Secondly, the directors are demanding that as a price for them to continue to do business with us.

We are in competition with the other motion pictures studios for the talents of these directors. So, we want to curry their favor. This is one way we are forced to do it.

Even if we didn't want to do it, we would be forced to do it because of the competition.

Now, obviously these technologies -- and again, one of them dates back to 1961 -- permit us to reach markets that we otherwise might not be able to get, such as television.

They allow us to provide viewers with diverse viewing options.

I must stress the importance of non-theatrical markets to the motion picture industry, and to the well-being of our industry.

If we can't reach these markets, then the U.S. motion picture and television business, preeminent entertainment industry in the world will be grievously wounded. We will not disappear, but we will be grievously wounded.

This is so because our is a high risk, high cost enterprise.

According to the Motion Picture Association of America, the average

cost of producing a motion picture in this country is now around 20 million dollars.

After that, around 9 million dollars in prints and advertising costs, and you can see why that is a very big investment for our company to make.

It is also a fact that most motion pictures produced by American producers don't make a profit in their worldwide theatrical retribution.

It's estimated that two thirds of the MPA company motion pictures never recoup their costs.

Now, in order to improve the odds for financial success, copyright owners must have the freedom to adapt their motion pictures to the differing needs of the consumer, and various transmission media.

If legislation were enacted to call into question the copyright owner's ability to do this, wide spread performance of their products so essential to recoupment of our huge investments would be seriously hurt.

I would like to address very briefly H.R. 2400, which as you know would grant if enacted directors a veto right over material changes.

Let me just say that we are opposed to it. I have gone into some great length in paper that we are submitting for the record, and I invite your attention to those remarks.

We feel that this is precisely the kind of legislation that would seriously injure our business.

Mr. Register, the advance of technology constantly imposes new questions for copyright experts. You are more aware of that than anybody in this room.

Many of these technologies threaten fundamental principles of the copyright law, such as new equipment that facilitates duplication of copyright works without the authority or right to ownership.

Other technologies further fundamental principles of copyright by expanding consumer access to the creative works, while at the same time respecting the rights of copyright owners.

That is the line that must in our opinion be drawn. We urge the Copyright Office and Congress to remain vigilant to this distinction, to discourage the former and to encourage the latter.

To do so would be consistent with the copyright act and the underlying constitutional grant that allows Congress to enact legislation.

Those are my remarks, and I ask that they be put into the record.

MR. OMAN: Your statement will be included in full, and we are grateful for your participation and the thoroughness of your statement.

Let me ask you the same question I asked Mr. Stevens.

Is there any middle ground that can be worked out that would allow for the editing of motion pictures for television and other theatrical media, in a way that would meet the approval of the directors?

MR. NOLAN: I think so. You will never in my opinion satisfy a director on issues like this completely.

On the other hand, I think a lot of the voluntary processes that are now taking place, such as the one I mentioned during my remarks, do go a long way for reconciling the differences between the two groups.

I would prefer that -- I mean, obviously I prefer that things be worked out voluntarily. I think anybody would agree we that.

We do have the collective bargaining process. We have the individual contract negotiation process. Plus we have market forces such as I referred to that encourage this kind of reconciliation.

MR. OMAN: Thank you.

Mr. Patry.

MR. PATRY: My questions are rather detailed about the collective bargaining agreement in some sections, that in light of the fact we are trying to finish by 5:30, I will if you don't mind submit them to you in writing.

MR. NOLAN: I would not be in position to answer those in any case. Nick Counter would.

MR. OMAN: Mr. Schwartz.

MR. SCHWARTZ: I will keep myself brief as well and submit some questions to you. How would you see moral rights being enforced at a practical matter, assuming your worst nightmare that they were enacted.

Would you really expect the director to invoke these rights and don't you agree that it would take a jury to decide what was a mutilation or extortion?

MR. NOLAN: That's correct the way the proposed legislation is now written, right.

MR. SCHWARTZ: You say that you never see directors that would actually be satisfied. Don't you think that director wouldn't invoke the moral right the same way that they invoke their rights to get the Director's Cut to the studio? It's a working process to get a film to Director's Cut and then turn the picture over to the studio for marketing.

The point being that wouldn't they just invoke it in those rare instances of mutilation of distortion which would be a court imposed standard of what mutilation and distortion is; and one would assume it would be something that would be a high standard and very rarely invoked as a court opposed right.

Do you see it that way or not?

MR. NOLAN: I will give you a computer printout at some point of all the litigation that is filed against our company. You can categorize half of it as frivolous.

So, the ingenuity of litigants in this country for creating claims through the courts is boundless.

MR. SCHWARTZ: How many of these frivolous cases have you won?

MR. NOLAN: We win them all.

MR. SCHWARTZ: So, it would only mean more business for the legal department but otherwise nothing lost.

MR. NOLAN: But the practical impact is it would take away money that we could invest in new creative works.

MR. SCHWARTZ: In the interest of time. I am going to submit a couple more questions to you in writing at a later time.

MR. OMAN: Thank you very much, Mr. Schwartz.

Ms. Schrader.

MS. SCHRADER: Mr. Nolan, do your member companies who are having films colorized fully expect to be able to market those films in Europe? Do you expect that there will not be claims of moral rights, or if there are claims that they will be unsuccessful?

MR. NOLAN: I don't believe they would be successful, but on the other hand it is an issue of first impression around the world.

I don't know of any case other than the trial court preliminary ruling, and I am not sure how the courts around the world would come out on it.

MS. SCHRADER: In the course of marketing films in the past, have your companies experienced any significant problems in distributing films because of moral rights claims of directors; for example, especially where you hire foreign directors?

MR. NOLAN: The only serious problem we ever have had is with an American writer of an underlying literary work, who sued us in France for a purported violation of his moral rights.

The case involved the motion picture "Aristocats." The case went all the way up to the French Supreme Court, which affirmed the court of appeals ruling that we did not violate the moral rights of this author; but not -- in terms of any of these technologies, we have never had a claim.

MS. SCHRADER: That's Disney's experience.

Why do you think there is so few cases? Is it because you don't violate the moral rights?

MR. NOLAN: I suspect so, but also I think Americans are reluctant to file suits in foreign courts; and also foreigners are generally more reluctant than Americans to file suit. That's my speculation.

MR. OMAN: Mr. Flacks.

MR. FLACKS: Thank you very much for the useful information in your

statement about panning and scanning, and on time compression and the importance that you attached to it in dealing with broadcasters.

I see your point that it would be difficult to deal with broadcasters -- to exploit broadcast market -- if you didn't have a high degree of freedom to adapt products for that use -- it's compatible use with the way broadcasters prune to fit time slots and so on and so forth.

What if instead of complicating your relationship with the directors, legislation would be passed which simply prevented the broadcasters from showing your product in adulterated form -- "adulterated" form is not the correct language, but you know what I mean?

What if they said films shown on cable television had to be shown in complete version. Do you think that regulating that end as opposed to the relationships between you and directors would so modify the broadcast market and the film industry would not get hurt?

MR. NOLAN: I think so. I also think it's a political impossibility. That's my guess based upon having been in legislative fights with broadcasters, but, yes, I think we would get hurt.

MR. FLACKS: My second question has to do with Mr. Bolten's testimony. He pointed to the difficulty that film educators have in acquiring complete high quality film materials used in teaching, and that the availability of products derived from television and video market just isn't adequate.

He considered proposing an idea for a film clearing house to facilitate the creation and distribution where necessary of such film materials for education.

Pushing aside for the moment how that would be paid for, do you think that is the sort of possibility that the Motion Picture Association of American and its companies would be willing to explore with educational interests to see if there is a problem, and if so whether a clearing house could help.

MR. NOLAN: This is the first I have heard of this problem. We have a very aggressive marketing program for our motion pictures in the educational market.

MR. FLACKS: Disney has.

MR. NOLAN: I can't speak to the other companies on this issue, because I am not prepared on it; but we can perhaps do a survey of our member companies to see if they would be willing to do it.

From Disney's standpoint, we don't really see a need for it, because we are out there marketing our films directly to the educational markets and have for years and years.

MR. FLACKS: Thank you.

MR. NOLAN: We have a natural interest in the educational market, because that's one of our focus -- targets of our motion pictures.

MR. FLACKS: Thank you.

MR. OMAN: Thank you very much, Mr. Nolan. We will be submitting additional questions. Maybe you can share them with you co-witness.

MR. NOLAN: Thank you very much. Thank you also for adjusting the schedule. I appreciate it.

MR. OMAN: Our pleasure.

The next panel is the video dealers panel. We are very pleased to welcome Vans Stevenson of Erol's, and Mr. Burton Wides, Counsel for Video Software Dealers Association.

Mr. Stevenson, Mr. Wides.

MR. STEVENSON: Thank you, Mr. Oman.

Just for the record, I am director of public relations for Erol's Incorporated, and we are a suburban Washington based video retail chain. We have 165 stores in the United States and the District of Columbia.

We have been marketing a handfuls of colorized motion pictures on videocassette that are primarily for sale over the past couple of years, and it's become evident to us based on sales that there is a segment of the population that prefers to purchase the colorized version of certain motion pictures on video tape.

It is likely that many of those customers that purchased the colorized version, would not have bought the title if it was not available in color.

In 1987 for example we merchandised "It's a Wonderful Life" in both black and white and color. We sold 2113 copies in color at \$9.95, and 648 copies in black and white at \$7.95.

We support the position of the Video Software Dealers Association of which our company is a member. We believe that the consumer should have the freedom of choice, if such a choice exists with a particular motion picture.

We are a retailer in business to serve the general public's desire for motion pictures on video cassette, and the success of our business is based on the demand of that product.

Colorized movies on video cassette will only survive if there is consumer demand, and at this point it appears there will continue to be a demand for both colorized as well as black and white versions of certain motion pictures.

Those are essentially my comments; and if anyone has any questions, I would be glad to answer them.

MR. OMAN: Thank you very much.

Mr. Wides.

MR. WIDES: Thank you, Mr. Oman.

I am counsel for Video Software Dealers Association, which is a national trade association of video distributors and retailers representing close to 20,000 of the estimated 30,000 retail home video stores, industry outlets. Also estimate that there are tens of additional thousands of convenience stores, gas stations, supermarkets and other businesses that deal in significant amounts of bring home sale of videos.

We have not submitted a formal statement to supplement the data in the statement provided by Erols, but we have worked with the staff in obtaining additional data from other members.

We may have a statement to submit after the hearing and after reviewing the record.

However, we have just been through a major effort in connection with the legislation in the interior appropriations bill; and based on our experience in that regard, I would like to offer several brief observations that may be useful or at least relevant to your present inquiry.

Initially, we would were really merely interested observers. As the saying goes, we didn't have a dog in that fight.

We made clear to the Congress and the parties involved that a recent survey of our membership indicated overwhelmingly that the members of the SDA preferred no restraints on the availability of colorized films, because of what Mr. Stevenson referred to clear interest on the part of the large portion of their customers for colorized films.

This was certainly consistent with what has been the hallmark of our industry, which is serving the public through their freedom of choice.

However, it soon became clear that many of the proposals would have a very unfair and unjustified impact on our dealers.

Our dealers are basically innocent bystanders to the dispute in that it involves circumstances over which they have no control and incomplete information, particularly with regard to what changes may have been made in a film, and certainly with regard to whether those changes may have met a particular official standard for triggering labeling or other allegedly remedial requirements.

Therefore, we did participate vigorously in the legislative consideration, and I would like to offer for the record copies of several of the SDA communications to the Congress, which detailed our concerns with these kinds of proposals.

As a result of these communications by many members across the country to the senators and congressmen, a number of changes were made in that legislation.

Based on that experience, I would like to simply offer three observations, which we think are part of the lesson of that experience.

The first is that in any attempt by bureaucrat valor or delegation to -- industry group of official status to judge artistic merits or to assess the degree of which the so-called integrity of our work has been impaired, as to whether it should trigger Governmental regulations, we are really opening a Pandora's Box of both constitutional and policy problems.

The constitutional problems which you are aware of involve not only First Amendment issues, but also depending on the structure of the scheme, questions of delegation through private parties, questions of separation of powers, or policy level extreme micromanagement by the Government.

In the case of the copyright law, we ran into erroneous suggestions that the copyright law had to be furthered by curtailing and exposing even to copyright liability copyright owners.

We found in particular, to take one example, that there were proposals and still are proposals for extending any labeling requirements to advertising of the promotional materials.

We believe that compounds concerning the First Amendment concerns as well as policy concerns in the actual business of the video -- home video retailing, advertising and promotional materials cover a very wide range, going from nationwide media, to entertainment by the producing studios, to thousands of individual retail stores and family businesses taking out local media advertisements, to promotional materials and displace in stores, handouts at the counter, and even to mailings to consumers.

To try to encompass that universe under imposed Government regulations for requiring inclusion of disclosure of other information, we think creates incredible complexities, incredible practicable burdens for our members.

I think at some point, it even raises the question or the need to keep in prospective in the pursuit of artistic integrity incentive for creators some prospective of this industry and its regulations relatives to Government regulation of Congress generally.

Grocery stores that have special advertisements for sales of food products they sell are not required to in any way replicate labeling that is required by the Government on their cans of soup.

Pharmacies in advertising for either over-the-counter drugs or prescription drugs are not required to replicate or include in their advertisements any aspect of the labeling information required by FDA.

Even convenient stores in advertising specials on cartons of cigarettes are not required to repeat the surgeon general's warnings in their stores.

Now, at some point one has to wonder in terms of singling the industry for what kind of regulation there is going to be, as to how far one is going to go.

The second observation I would like to make and the second lesson we learned is, in order to meet these problems, the proposals while they may start out as consisting of a few apparently simple enunciated principles of equities or concern, end up usually being sufficiently complex schemes as to make the holder weak with envy; and in the process, really make this area

a prime candidate for the famed law of unintended consequence of congressional legislation.

I would really urge you in considering any proposals not only to focus on the extent to which that proposals meet the alleged problems, which is the purpose of the inquiry or the potential or perceived problems, but the degree to which they create more problems than they solve.

In our case, we are particularly concerned about the impact on the video dealers as I mentioned, but there also a question of their impact on our customers.

The inquiry notice for your study and for the hearing, refers to the impact of the technologies on access for the public to audio visual works.

I would urge you to also take into account the impact of proposed solutions on the access of the public of audio visual works.

I think the technologies certainly increased the access to the public in that the case of colorization, whole new generations of young Americans have been able to enjoy films that probably otherwise they would not pick to see, given that a great many of them are seeing films in color, whether that is for good or ill.

Beyond that when there is extensive regulation and as many of these proposals would include, the threat of liability or other financial loss for video dealers, there is going to be a considerable drop off in their interest and willingness in carrying some of these films. Therefore, the public will in fact be denied access to them.

Another point on the access question is the question of disclosure for the public's benefit.

I think that you need to focus on really what the purpose of the disclosure requirements are. If we are going beyond colorization and we are talking about panning and scanning or other technology that applies across the board, both of movies shown on television or movies in video cassette form, I really would agree with Mr. Patry in regard to the comments exchanged with a previous witness. I accredit the American consumer with a little more intelligence.

I think after decades of watching films on television, and many years of watching films on video cassette, the American people know that they are seeing something that is not going to be exactly the same as seen in the large screen theater.

I think disclosing that fact to them through very cumbersome series of requirements and regulations is of marginal utility to them, although may serve other purposes beyond their agendas.

Lastly, I would observe that in collecting the data, although you are under obviously an injunction from the Congress group for that, if the interior appropriations provision is finally enacted, given the complexity and given the great likelihood of unintended consequences on the consumers, on the video retailers and on many other facets of the dissemination of movies in America, I would think that one of the main recommendations you could make to the Congress is that critical data would include how the existing provisions in the interior bill would in fact work out in the real world and impact over the next year or two before any larger scheme or more ambitious effort is undertaken to broaden this kind of intrusion into the private market.

That concludes my remarks, and we are prepared to take questions.

MR. OMAN: Thank you very much.

I have one question, and you perhaps can choose who will answer it.

We heard some discussion that colorized motion pictures out-strip the sales of the black and white motion pictures, but the rental of black and white pictures out-strip the regular colorized versions.

Is that your experience? Is that the experience of the members of the video dealers? If so, is there some rational explanation for it?

MR. STEVENSON: I can do it on behalf of Erol's.

If I take a look at sales -- and this is through June of this year and I will include 1987 in those figures also -- we sold a total of 2307 colorized versions of motion pictures, and 2132 in black and white.

Now, based on my testimony, you know that It's a Wonderful Life was the majority.

In some cases, for example, if I take "The Maltese Falcon," we sold a total of 591 black and white, 6 colorized.

It depends -- it really varies depending on title and availability in terms of sale.

Another thing that I ought to mention is price of an individual movie. That has more of a guiding factor than anything whether somebody will buy a film or not.

It's correct in terms of black and white because the majority of films that are being colorized are classics, and they are among the least rented in our stores. So, we may add -- for example we may buy 60 copies of Good Morning America per store throughout the chain. Where "It's a

Wonderful Life" we may have three black and white and one color in each of our locations.

So, based on title -- based on title, based on time, each title varies.

MR. OMAN: Is that for sales or rental or both, the 3 and 1?

MR. STEVENSON: That's for rentals.

Sales will vary depending on store and neighborhood.

MR. OMAN: There is no experience that you will stock more of color because of the higher price tag and fewer of the black and white, when there are fewer black and white sales and more color sales?

MR. STEVENSON: No. It depends on the demand.

It depends on title. It depends on store.

MR. OMAN: You would try to fill a demand of that business?

MR. STEVENSON: Right. Most of our sales -- except in the Christmas season, most of our sales are special order, unless the tape is very, very low priced where we can stock it and we believe there is going to be a demand for it.

MR. OMAN: I see. I will forego the opportunity of other questions, although there are thousands of people in this city who would kill for the opportunity to grill Burton Wides the way he grilled them on the witness stand, at the right hand of Senator Kennedy; but I will forget that pleasure at this time.

Mr. Patry.

MR. PATRY: First I have a question for Mr. Stevenson.

Have you had any experience with letterboxing, any feedback from your customers concerning letterboxing?

MR. STEVENSON: Not at this point, no.

MR. PATRY: Just based on your knowledge of the industry, do you think that if it were required that films be letterboxed, that would have an adverse impact on your business?

MR. STEVENSON: I think it would have a tremendously adverse impact on our business, because I think it has been testified before by other witnesses when people watch television, they are used to watching it full frame; and it's a different medium and a different way of watching a particular work, whether it be a motion picture or made for home video tape.

After, you know, 40 some years of experience in terms of watching television, I think people realize that when they sit down to watch much a motion picture on video tape. I think there would be a lot of complaints. I think you would turn a lot of people off to the home video experience.

MR. OMAN: Can I interrupt for just a moment?

MR. STEVENSON: If it was required on all subsequent motion pictures.

MR. OMAN: You wouldn't want to give the viewers the option you give them in the black and white and color? You wouldn't want to go give them the opportunity of panned and scanned versions or the letterbox version to choose the one they prefer?

MR. STEVENSON: For rental or for sale.

MR. OMAN: Rent or sale.

MR. STEVENS: It would depend. I am just speculating at this point. I would think the majority of our customers would prefer full screen.

MR. OMAN: Even with the example of Fred Astaire where he kept popping in and out of the screen --

MR. STEVENSON: The only reason I say that is, I guess we have after running 100 million tapes since 1981, I am not aware of any complaints or anybody asking to be able to see a film in that particular form.

MR. WIDES: If I could comment. I promised to keep my hand down after your kind referral, but I should say that in the practical role of video retailing, some of the stores sufficiently small in size in terms of their physical space, that requirement that they need to carry a black and white and a colored film, and panning and scanning version and other versions of the film as well at some point is going to impact either on their decision to carry the film at all in terms of the space it would take up if they think perhaps want to have one or two copies for a few people who might be interested, or on the number of films they carry overall.

So, there is again some unintended consequences trying to cover all the choices.

MR. OMAN: I was thinking in terms of a voluntary basis -- whether the owners would make more money if they carried more versions. If there are those who would buy "Seven Brides for Seven Brothers" if it were in letterbox format, but wouldn't buy it in the small screen format, since they would lose half of the effect.

MR. STEVENSON: I think just in terms of the letterbox format it would take a tremendous advertising campaign and consumer education efforts to educate people to what it was in the first place.

MR. OMAN: I'm sorry to interrupt.

MR. PATRY: That's okay.

In fact, what's wrong with that?

MR. STEVENSON: Well, I suppose nothing is necessarily wrong with that, but I think people based on looking at a television screen might feel cheated because the entire screen isn't filed.

MR. PATRY: If there was a labeling requirement that said this film has been letterboxed --

MR. STEVENS: I think our swicchboard would light up like it has never lit up before.

MR. PATRY: You -- you being Erols here -- don't have any difficulties with the sort of labeling that the companies do on boxes or other material?

MR. STEVENSON: No, not at all. We use the original art and place it on our own boxes.

MR. PATRY: Mr. Wides, you had mentioned the spector of going down the slippery slope for some liability for video dealers or how having extras -- as far as I know, there are no existing bills, amendments or proposals that would in any way require any labeling beyond that which is in the film register board legislature.

Do you know of any?

MR. WIDES: There is two answers to your question.

In the first place in the course of the senate house conference, some compromised proposals were advanced which included expanding the disclosure requirements beyond the labeling on the package to any advertising; and I

believe that the Kastenmeier Bill also includes a comparable requirement with regard to promotional materials as far as packaging.

Secondly, with regard to the provision before it was changed, the house provision prohibited distribution. The form was finally passed by the house. It prohibited any distribution of items which did not carry appropriate labeling, which meant that while we might not have had a liability to put on a label, we faced the distinct prospect especially with the situation where you know in the early versions as passed by the house, the rules of the game could be changed in a kaleidoscopic fashion as to what was on them even after the films had gone into distribution.

Our members easily could have been caught with inventory they bought in perfect good faith, which then in effect became contraband on their shelves and was nondistributable.

There is no clear question of whether they could be compensated with regard to the bill as it was passed in conference and now passed the house.

That has been remedied I think it's fair to say in response to our expression of concern.

MR. PATRY: You can live with the way it is now?

MR. WIDES: I believe so.

MR. PATRY: You are going to live with the way it is now in any event.

MR. WIDES: I believe it addressed our concern.

MR. PATRY: One final question, there is issue a variety in a survey in 1988 which says about colorization, "More recently Video Software Dealers

Association polled its membership on the subject, and then decided for undisposed reasons not to produce its findings."

Do you have anything more --

MR. WIDES: Sure. That's inaccurate. The SDA put out press release indicating the results of the pole. It was not a formal research document. It was basically a letter response.

The results were calculated and made public by the SDA, and overwhelmingly the dealers indicated that -- as I indicated in response to the question, that they opposed restraint because such a significant number of their customers clearly wanted access to colorized films of the original black and white.

MR. PATRY: If you wouldn't mind giving us a copy of that.

MR. WIDES: Sure.

MR. PATRY: Thank you, Mr. Stevenson for all the cooperation you gave us in responding to our letter to you. It was helpful.

MR. OMAN: Mr. Schwartz.

MR. SCHWARTZ: I also want to thank Mr. Stevenson. I think most of our questions were answered by the submitted list of questions and answers we gave Erol's about their sales, and which you voluntarily gave us answers for regarding sales and rental statistics. It was very helpful for us.

The one observation I might have about letterboxing is that if people don't know it exist, they will never know if they like it or not. I think that if it was forced on viewers you are right the switchboard would ring like crazy; but I think that if implemented gradually it might grow on them.

It might not; but so far except for three or four directors, there is not much chance to view videos that way.

My second observation is something that Mr. Wides said about space problems. That's a little troubling, because I think if in fact one of the arguments for colorization is that viewers have choices, there is a potential problem if physical space could some day deny that choice because the colorized version rented or sold more than the black and white version. The statistics are really too early to tell what the bottom line is right now in terms of viewer choice.

However it might be that if the colorized versions take off like crazy, and there is not shelf space, or not the desire to continue to carry the other versions the black and white will become scarce.

MR. WIDES: I am assuming that the people -- that some of the previous witnesses spoke about the strong interest in the classic version will continue to provide consumer demand.

It is a question of degree, and I was only trying to point out that at some point proliferation of variations of the particular title does raise a space consideration.

MR. STEVENSON: One other comment I think I want to make is that I think in our company's case, depending on how letterboxing might evolve, certainly we would carry it or make it available to customers that would want them.

I think it would be more apt to be a salesman than it would be in the realm of that.

MR. SCHWARTZ: Finally very quickly, Mr. Turner in his company's statements said that he will always make available black and white and color products in TV markets, but they would he only make video products available in black and white if it were commercial practical.

Since your sales statistics are pretty close to each other right now and the rentals are pretty close as well, I wonder if you have any fears about getting access to black and white works? I assume you don't have a space problem because most of your stores are pretty large.

Do you foresee a day when you might have a problem getting access to the originals if they become less commercially practical. There could still be a small market -- a small minority of people, who still demand -- these originals. Do you see the potential for that?

MR. STEVENSON: I think it's difficult to tell.

If, for example, a particular titles was released from the Turner library that is not there now, and it was only available in color, I think that we would probably to satisfy that other demand as indicated if you can buy the colorized version, you can watch it in black and white. It's a simple adjustment on your television to change it.

I think we would take that responsibility, because we do have a significant number of customers that will buy films and want them in their original form; and certain with a colorized version, you can always watch it in black and white.

MR. SCHWARTZ: We have heard some conflicting testimony -- maybe not today, but in some of our other discussions -- about whether or not, in fact, by turning down the knob, you are seeing a copy in which the color

contrast is as good as in other versions -- original black and white versions. Any comments?

MR. STEVENS: I think as with any technology, in the beginning of its distribution, there are always certain flaws that have to be worked out. I would image in the future with the companies that are using colorized techniques, will preserve that integrity and it will be there.

MR. WIDES: I might add that if one really wants to pursue the principle of choice, if you have a family with a number of children whose parents might well have some strong opinions about whether they want to see the film in black and white or color, and being able to rent it in color and turn the knob on the dial to black and white, which my understanding you can with an overwhelming number of films and certainly in the future with current technology would be extremely close if not identical in terms of the value is really the best way to preserve the alternative to the public to see either one.

MR. OMAN: Thank you.

Ms. Schrader.

MS. SCHRADER: I have no questions. Thank you for your testimony.

MR. OMAN: Mr. Flacks.

MR. FLACKS: None.

MR. OMAN: Are you prepared to make a prediction on the outcome of election based on the convention?

MR. STEVENSON: Not today.

MR. OMAN: We will be waiting.

Our next witness is Professor Peter Jaszi of the American University, and my staff tells me that I should most definitely remind him of the time constraints.

MR. JASZI: That's not nice.

MR. PATRY: Experience.

MR. OMAN: In fact, we are under time constraints. The Court Stenographer wants to leave at 5:30. We will be able to cover any overage by video tape, but we urge you to try to limit your remarks to ten minutes.

MR. JASZI: I have a class to teach at 6. So, I am inclined to do my best as well.

MR. PATRY: Me too.

MR. JASZI: I am a teacher of copyright law at American University Law School, which I guess calls me to speak about either nothing or everything, depending on its point of view.

I also have a fairly longstanding interest in the application of copyright principles to what might be called classic American motion fixtures. I have litigated some in the area and written about some.

That interest in some sense predates my years as a lawyer, and part of my misspent youth was devoted to watching, writing about movies, and teaching film study course and running a couple of repertory revival motion picture houses.

So, although I can no longer claim to be a professional film student, I am jealously guarding my amateur status in the brute sense of the word.

In the interest of all disclosure I should say something else, which

is that I yields to no one in my suspicion of the colorization technology and all its works.

I am one of those people who will go to extremes to view motion pictures in black and white original formats, believing that they are superior in aesthetic quality and historical interest.

I am more than that. I am someone who is prothesize actively whenever given the opportunity in favor of those originals forms and formats.

I have said all this about myself because I think it bears on the issue that I want to address. I think that it's the existence of people like me and our views that creates the colorization problem if one could be said to exist.

That problem it seems to me is not so much one having to do with the interest of the makers of the motion pictures that are at risk from colorization, but with the interests of the audience who deserve the meaningful choices, to deserve -- to put it differently and using a word that's been -- well used I think in all the testimony that I have heard this afternoon -- deserve access.

What I want to suggest today to argue at greater length in my prepared testimony is that an approach to the colorization problem based on extending the concert of authorship expanding the right to enjoy by individual authors isn't likely to address effectively that public interests and access.

I think it's important to remember and certainly been reminded often enough this afternoon that the copyright system is ultimately a public

purpose. It exists in public access and works creativity and not something to recognize contribution of creative workers.

Generally speaking the American copyright law we have had a lot of success in promoting those public interests by focusing our attention on the concept of individual authorship, but the concept of individual authorship isn't a universal solvent like all conceptual concepts.

It has its limitation where utility is concerned. I think in the case before us now, that concept may have reached the limits of its utility.

If our concern is public access to the black and white versions of motion pictures, then given any group of private persons a waivable right to object to their colorization seems to me unlikely to produce the desired result, unlikely to promote the access which we are striving to assure.

It's predictable I think, even inevitable that were such rights in the nature of moral rights be created, they would in most cases for one reason or another go unexercised.

Now, the argument that film makers are somehow in some real, some extra legal sense of the authors of the movies they create doesn't seem to me compel the conclusion that they ought to be invested to private rights to object to colorization or to other alterations of those films.

The concept of authorship through all of its multiple associations is after all not a real concept. It's a construct, a legal and cultural construct which have been copied over time in the last 309 years or so to serve a variety of important functions.

It's important to remember too that outside the legal realm of the

utility of concept that authorship is neither becoming a creative support in creativity is being severely challenged.

The notion that authors are linked to their works by some kind of intimate unbreakable connection that should survive the commercialization of those works, the notion that adheres the moral rights philosophy that very much abide by that a particular visual authorship, a vision that is a byproduct of romantic late 18 and early 19 Century visions of the creative process, and that's understanding authorship in any contemporary.

I argue that the intentions of the creator of the work, even to the extent they may be able to determine them, don't really matter or shouldn't really count once that work has been released to the publisher in our copyright jargon use the term publication.

For those critics it's the audience memory, the reader, the consumer or user is ultimately responsible for determining a work's significance.

Now, this is not the forum which to debate the appropriateness of various visions of authorship in literary criticism.

I mention these developments because I think we should be careful about extending the coverage of copyright law in traditional concepts of authorship based on unexamined cultural assumptions, which may themselves be on their way to becoming out moded.

I think it also important to remember the authorship concept has applied to motion pictures in particularly.

The means by which these various goals were accomplished was to repeat through the identification of film authors, usually directors. I think that campaign and that means accomplished a great deal.

We did a great deal to promote serious film studies and serious film appreciated in the United States and elsewhere.

Again, I think we should be careful about the confusing misuse of essential notion of film authorship with some kind of external social reality, which we can refer as a source of guidance in a deliberation such as this.

There are some severe practical problems too dividing any solution of the problem of colorization, which the is based on notions of authorship.

In fact, courses has been pointed out in several occasions this afternoon, motion picture result from a complex process of collaboration between various artistic and nonartistic participants in commercial filmmaking.

To single out a particular participant, with a process this complex, and vest them with the characteristics of rights bearers on general matter is to invite difficulty.

One of the things I do in the prepared version of my testimony which I won't repeat here in the interest of time is talk a little bit about the concept the motion picture authorship in several foreign legal systems. France and Germany I think are the ones I mentioned.

I point out far from giving us useful guidance in how to resolve the question, how to vacate films authorship on a general basis for the purpose the implementation of seam of moral rights, these foreign statues seem to suggest the difficulty if not impossibility of the enterprise, each takes a different approach.

Some are categorical. Some take refuge behind presumptions, and some others leave the whole matter up to the courts to decide on a case-by-case basis.

None of those examples of foreign law suggested this problem would be easy to solve, if possible to solve fairly and efficiently on a general basis in American law.

For all these reasons now, it seems to me that the colorization problem which I referred before is unlikely to be addressed on an authorship basis moral rights solution.

The solution that I think is required is one that I might term -- which I do term in prepared remarks -- as a text base solution. A solution that focuses on the work and the audience's interest, and access to work in its various forms rather than on the punitive author of that work.

The most drastic text base solution of course would be some form of absolute prohibition on the colorization across the board.

That approach as satisfying as it might be short-term to some audience members would seem to me suspect in that it would fail to serve the access interest of other audiences.

Problems of choice arise. What will determine the contents of the list to be selectively safeguarded in this material alteration. Will it be the standards elite film culture, standards of the commercial film culture, or some compromise between the two.

We have a course in copyright which we refer to as passing a Bleistine problem. It seems to me that the attempt to creates a certified

list of film classics for purposes of their preservation against alteration would raise in effect Bleistein problems of the first order.

There is the another, which has the same shortcomings if done on a selective basis, and which are done on a general basis has the drawback of doing nothing affirmative to promote access save to create conditions which might less in theory prevent market mechanisms to bring about the eventual increase of pressure for access.

What I described towards the end of my prepared remarks are a few of what I would think as the utopian solutions to promoting the problem of access through text based approaches.

The imposition of some requirement either by film distributors or retailers to make both an original and altered versions available to the public. The creation of Government programs to promote and support the availability to interest in members of the public in the -- or the availability to interested members of the public of the original versions of black and white motion pictures; because with the suggestion of the national clearing house fits very well in that general category of what I would term utopian solutions -- utopian text based solutions the -- most practical of the imaginable text base solutions which have yet been proposed.

I offer these not because I have any judgment to give as to their political feasibility. Some I am sure would be out of the question. Others with modifications might be within potential political reach.

I offer these suggestions because it seems to me it is important to try a deliberation such as this one to try to focus as clearly as possible on what is really at stake.

Some consideration of these perhaps utopian text base solutions seems to me potentially useful in redirecting our attention to what seems to me is an essentially false sense of analysis of this case. One that puts major emphasis on the states, the film makers, to what seems to me a more appropriate interest analysis one that focuses squarely on the access interests of its audience members.

MR. OMAN: Thank you very much.

You just made it under the wire.

MR. PATRY: His clock stopped.

MR. OMAN: Let me ask Mr. Patry for his questions.

MR. PATRY: I have no questions.

MR. OMAN: Mr. Schwartz

MR. SCHWARTZ: In the interest of time, I will ask questions of my former copyright professor the same way as I always do, by phone. Thank you.

MR. OMAN: Ms. Schrader.

MS. SCHRADER: I will join in also thanking you for your comments. We will certainly reflect on them. I have no questions.

MR. OMAN: Mr. Flacks.

MR. FLACKS: No questions. I can't resist commenting that I hadn't realized until you gave your oral testimony, is what you are really saying is we should shift away from the pursuit of false analyses from seeking utopian answers; but I think that there is actually some more practical stuff in what you have in the written statement. Utopian is not quite the right word.

MR. JASZI: I trust you know what this means.

MR. OMAN: Thank you very much, Professor Jaszi.

We are extremely pleased to welcome Dr. Thomas Dreier and Ms. Silke Von Lewinski from the Max-Planck Institute in Munich. They get the prize for having traveled the furthest for the hearing.

We welcome you and urge you to make the most of your time.

MR. DREIER: Thank you very much.

May we first of all -- I should perhaps briefly introduce and explain that it's necessary but it may not be that well known in the United States, we are one of the societies which basically is a nonprofit organization organized under private law, and which is financed by state and federal money.

We are doing basic legal research in the field of foreign international patent and copyright competition law in Munich.

Now, since we didn't bring any video and our presentation seems to be somewhat dry as we call it, we decided to go ahead and give our testimony by doing some alternate speech, piecing the whole thing up, and doing alternate testifying.

On the other hand, it also is a time compressing, but this will probably be of no harm. First of all, we are the authors of a paper, and second, you got the full text available so our answers should be secured.

Now, we jump right away into the legal issues which today probably have not been addressed for that extent. We should consider that the colorization of motion pictures does not give rise to just one legal precedent, but after all several intricate issues.

of archival preservation certainly falls within the scope of 'fair use.'" 335

Thirteen years later, much has been accomplished to restore and preserve this "irreplaceable contribution." Yet, much more remains to be done. Increased cooperation among all concerned with this laudable effort will assure that the goal of restoring and preserving America's existing film heritage will be reached.

335 H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 73 (1976).

CHAPTER 7: CONCLUSIONS

In reaching our conclusions, we have had the benefit of detailed, informative written comments, a full day of testimony from a wide cross-section of industry, academic, and public interests, as well as three years of congressional hearings that touched on the question of moral rights.

The term "moral rights" does not have a precise definition; in general, it refers to noneconomic rights permitting a creator to ensure that his or her personal vision, as embodied in a work of authorship, is respected. The principal moral rights are those of the right to claim (or disclaim) authorship and the right of integrity. The right to claim or disclaim authorship protects an author's ability to receive credit for his or her creations, or to disclaim authorship of works that he or she did not, in fact, create. The right of integrity permits an author to prevent changes in his or her work that are injurious to his or her honor or reputation; for example, changes that distort or mutilate the author's vision.

Motion pictures are the result of technological innovation. As that technology has improved, the industry and the public have benefitted. Technology has, however, also been used to alter motion pictures after their theatrical release. This has principally occurred in transferring films for broadcast on television and cable systems, and for the home videocassette market. These alterations include the electronic compression or expansion of the running time of the film in order to fit it into

broadcast time slots, as well as "panning and scanning" -- an older form of technology used to compensate for the different size of theatre and television screens. A recent technology, introduced commercially in 1985, is computer color encoding ("colorization") of black and white films. This technology is now used only for the home videocassette market, and for cable and broadcast television.

The Directors Guild of America, and some actors, writers, and cinematographers, have protested these post-theatrical changes to motion pictures and have sought federal legislation granting them a higher level of moral rights than they now enjoy, which they would use to prevent (or permit) these alterations. The motion picture producers and corporations doing the computer color encoding, as well as broadcasters and video retailers have all resisted these efforts. These groups argue that the marketplace and individual and collective bargaining adequately protect the rights of all involved, including the public, and that legislation along the lines advocated by the directors would adversely affect both the creation of motion pictures and the public's access to existing motion pictures.

Predictably, some of the evidence presented to us was speculative; e.g., the effect of an increase in the level of moral rights on the marketplace for motion pictures. Not surprisingly, the parties offered opposing opinions on the nature of that effect. Of course, absent actual implementation of such increased rights, hard data will not be available. We are not bereft, however, of any evidence. In the past, directors and others involved in the creation of motion pictures have collectively bargained for increased artistic control of their contributions to the film,

while the producers have fought these demands tooth and nail, claiming that if they were adopted, the industry would suffer irrevocable damage. In some instances, the directors and other creative participants won the battle for increased artistic control, and in these instances, the predicted damage did not occur. As a consequence, we have not uncritically accepted either side's predictions that civilization as we know it will cease to exist if their respective positions are not completely adopted.

We have also had the benefit of the experiences of foreign countries that have both developed motion picture industries and a high level of moral rights.

Accordingly, the conclusions we have reached are based upon a careful analysis of the best available evidence, with the realization that that evidence is, of necessity, partially incomplete. It is not so incomplete, however, that informed judgment is impossible.

Before proceeding to our conclusions, we pause to note a fundamental assumption we have made -- namely, that in adhering to the Berne Convention, the United States has affirmatively declared its acceptance of moral rights. This assumption is based on Article 36(2) of the Paris text of the Berne Convention, which states that "at a time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention," and on Sec. 2(3) of the Berne Implementation Act of 1988, P.L. 100-568, 102 Stat. 2853, which declares that "[t]he amendments made by this Act, together with the law as it exists on the date of enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention..., " as well as an extensive

legislative history covering the question.

Article 6bis of the Berne Convention mandates the provision of the right to claim authorship and the right of integrity. The legislative history of the Berne Implementation Act of 1988 is replete with references to existing federal and state law as providing a sufficient level of moral rights to fulfill our obligations under Article 6bis. While there has been a healthy debate over the accuracy of this opinion, it nevertheless reflects Congress's considered judgment, and our charge from the Subcommittee did not include reexamination of this question.

The issue then, is not whether there should be moral rights at all-- Congress has already answered that question affirmatively -- but, whether there should be changes in existing law, at least with respect to the motion picture and television industries. Our conclusions on that issue follow:

- (1) The Subcommittee should seriously consider a unified federal system of moral rights protection.

Isolating the motion picture and television industries from the larger context of moral rights for all forms of authorship is difficult, if only because of those industries' pervasive use of other forms of authorship, including novels, short stories and musical compositions. Beyond this, we conclude that the fundamental policy reasons supporting moral rights in the motion picture and television industries apply with equal, if not greater, force to other forms of authorship, and exist independently of industry-specific problems.

While much can be said for permitting a diversified approach to moral rights to develop in the states, strong arguments can be made for creating a unified federal system. As the Register of Copyrights wrote in his 1965 Supplementary Report on the general revision effort:

A single federal system would carry forward the basic purposes of the Constitution which, as Madison's famous statement in "The Federalist" shows, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when works can be disseminated instantaneously throughout the world, this uniformity is not only a positive advantage with respect to the use of works on national scale, but it also has tremendous importance when it comes to international dealings.³³⁶

These sentiments ring ever more true today, twenty-four years later, and especially after our adherence to the Berne Convention.

(2) If Congress adopts a unified federal system of moral rights, it should partially preempt state moral rights protection.

Adoption of a federal moral rights regime necessarily requires at least consideration of preemption of moral rights under state statutory and common law. Congress could adopt a number of possible approaches in resolving this issue. First, it could provide that nothing in the Copyright

³³⁶. Register of Copyrights' Supplementary Report on the General Revision of the U. S. Copyright Law: Copyright Law Revision Part 6 at 82 (1965).

Act as amended would preempt any state law, thereby giving the states the freedom to provide variations on moral rights found in the federal statute as well as permitting them to provide additional rights. Second, Congress could preempt all efforts by the states in the entire field of moral rights, regardless of whether such rights were provided in the Copyright Act. And, third, Congress could preempt state efforts only in the areas covered in the Copyright Act, as amended, while permitting the states to accord other rights.

There are advantages and disadvantages inherent in each approach. The first approach permits states free rein to experiment and adopt rights fitting local conditions; however, by so doing, Congress creates the possibility of a patchwork quilt of treatment for the same right. For example, Congress could amend the Copyright Act to provide for a right to claim authorship for certain works but deliberately exclude computer programs. California could then provide a right to claim authorship for computer programs. Since computer programs are marketed nationally, the practical effect would be national adoption of the California statute. We also note that most of the state statutes provide for perpetual rights, an important consideration in light of the U.S. Constitution's "limited times" provision. For these and other reasons, the first approach has serious drawbacks.

The second approach -- preempting all state moral rights regardless of whether the federal statute provides the right -- appears to interfere needlessly with the valuable role states play in experimenting with new rights. The need for national uniformity is not so strong that it need

preempt state efforts in areas outside of the right to claim authorship and the right of integrity. Indeed, Congress may well benefit from state experimentation in such areas. A possible disadvantage with this approach, though, is that such state rights might conflict with economic rights provided in the Copyright Act. Of course, should such conflicts arise, Congress is free to pass legislation preempting the state right.

(3) If the Subcommittee prefers an industry-by-industry approach to moral rights, it should carefully consider whether the existing web of collective and individual bargaining in the motion picture industry provides an adequate framework for resolution of the issues.

We recognize there are good arguments supporting a cautious, industry-by-industry approach, one that accords rights only to particular types of subject matter, e.g., works of the fine arts. Rights and exemptions could be crafted with some precision and experience could be gained about the practical effects of a higher level of moral rights in the marketplace.

Should the Subcommittee opt for this approach, we are not convinced directors have necessarily made out a sufficient case to warrant extraordinary treatment outside of omnibus moral rights legislation. Of all categories of authors, directors are, in many ways, in the best position to obtain the desired rights through individual negotiation or collective bargaining. That such rights have not been fully obtained does not

automatically indicate that legislation is needed. In any individual or collective bargaining negotiation, priorities are established and compromises are made. We are not convinced that the present situation is the result of inequitable bargaining strength, at least if one compares the present rights and income enjoyed by members of the Directors Guild in contrast with those of the U.S. workforce as a whole.

The evidence also suggests that directors do not seek moral rights legislation strictly for the purpose of preserving the original theatrical version of the motion picture, but rather seek increased rights for the purpose of giving individual directors the option to permit or prohibit alteration of their work.³³⁷ While there is nothing wrong with such a desire, it does undercut the directors' invocation of the public interest as a basis for legislation.

Nor do we conclude that the public interest has suffered under the present structure. Never before in the history of the motion picture industry have so many works been so readily available and in so many formats. It is true that the marketplace is not perfect and that some of these formats may represent alterations of the original work that directors and others decry. However, there is no evidence suggesting that copyright owners are withholding or intend to withhold the original forms of these works from the marketplace for aesthetic reasons, or because they supposedly want to "push" the "colorized" version of the work. As long as

³³⁷. This does not, of course, apply to directors' attempts to prevent material alterations to works of other directors created during Hollywood's "Golden Era."

copyright owners continue to make available both the original, unaltered version of the work and the altered version, our system of government has always preferred that the ultimate choice be left to the public. Any new federal moral right that would eliminate this choice would have to be very closely examined. It does seem to be the case, however, that the number of original works is decreasing. This appears to be attributable, though, to nonaesthetic, market forces.

Nevertheless, moral rights do serve a valuable public purpose, and the Subcommittee may conclude, therefore, that legislation to increase these rights is appropriate.

(4) If the Subcommittee chooses to increase moral rights in the motion picture industry, the Copyright Office could support this effort in principle. This legislation would accord rights only to works created on or after the effective date of the legislation and would be granted to authors of preexisting works used in motion pictures, as well as to other creative participants in the motion picture (e.g., cinematographers, art directors, editors, actors and actresses).

If the Subcommittee chooses to increase the level of moral rights protection in the motion picture industry apart from omnibus moral rights legislation, the Copyright Office could in principle support appropriately drafted, constitutional legislation. Due to the likelihood that the takings clause of the Fifth Amendment would prevent Congress from enacting restrictions on existing motion pictures, Congress might want to encourage

the establishment of a voluntary industry-wide steering committee apart from the collective bargaining apparatus to work toward establishing voluntary standards or industry guidelines that would identify practices that are acceptable and those that are not.

Any future legislation should extend moral rights prospectively only to works created on or after the date of enactment and would extend those rights to authors of preexisting works used in motion pictures created on or after the date of enactment (e.g., to authors of novels and short stories and to composers), as well as to all participants who make copyrightable contributions to the actual creation of the motion picture (e.g., cinematographers, art directors, editors, and perhaps, actors and actresses).

On an issue not directly related to copyright, we received evidence suggesting that the economics of the marketplace have resulted in reduced general availability of unaltered forms of motion pictures. This trend will most likely continue. Accordingly, Congress should encourage preservation efforts so that the public will have continued access to what, all agree, constitutes a significant part of our cultural heritage. Such steps might include coordinating existing government, private sector, and academic preservation efforts, as well as studying ways to improve and fund future preservation efforts.

The issues raised by the present study are manifold, complex, and not susceptible of "sound bite" conclusions. The conclusions we have reached represent possible legislative responses to these issues.

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U.S. House of Representatives
Committee on the Judiciary
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February 25, 1988

The Honorable Ralph Oman
 Register of Copyrights
 Library of Congress
 Copyright Office
 Department DS
 Washington, D.C. 20540

Dear Mr. Oman:

Since our return from Europe and the extraordinarily interesting meetings we and our colleagues held with international film directors, we have been considering how best to deal with the many problems that technology and the marketplace have created for both the integrity of our national film heritage and the creative freedom of filmmakers. We have long been great admirers of films, and of the people who make them. We are concerned about any attempts to debase this form of art.

Film directors have made the argument that the new technologies of colorization, time-compression, and panning and scanning have dramatically impaired the integrity of the art of film making. The directors have passionately argued their case that Federal legislation is needed to protect films from these techniques. Our respect for the creators of these films bolsters our concern about the extent of these techniques, and about what the future holds as the use of these techniques expands.

We are, of course, aware that the Copyright Office has already decided the narrow issue of whether derivative work claims to copyright in colorized motion pictures may be registered. The ultimate determination of copyrightability is, of course, up to the courts.

We would like the Copyright Office to conduct a broader inquiry, relating to the extent of the use of such technologies in the future and to their impact on consumers, artists,

The Honorable Ralph Oman
February 25, 1988
Page 2

producers, distributors and other affected individuals and industries.

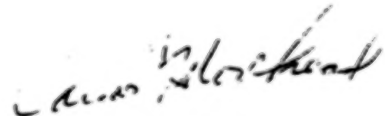
In carrying out this inquiry, the Copyright Office should consult widely, with as broad a spectrum of interests and specialists as possible. In particular, you should consult with representatives of the individuals involved in all facets of creating an audiovisual work; with distributors, broadcasters and other commercial interests that exploit such works or own copyright interests in them, and with consumers, archivists, academics and appropriate governmental agencies, such as the National Endowment for the Arts. Further, in all areas where relevant, it would be of interest to us to know of foreign practices and points of view. Perhaps, as was suggested by Professor Goldstein during his recent testimony, you could do a comparative study of one or two other countries.

Please do not hesitate to consult with the Subcommittee staff at your earliest convenience if you need further information, and to discuss a timetable for conducting your inquiry.

Sincerely,



ROBERT W. KASTENMEIER
Chairman
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice



CARLOS MOORHEAD
Ranking Minority Member
Subcommittee on Courts,
Civil Liberties and the
Administration of Justice

RWK:vsj



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF INQUIRY

REGISTRATION OF CLAIMS TO COPYRIGHT NOTICE OF INQUIRY; COLORIZATION OF MOTION PICTURES

The following excerpt is taken from Volume 51, Number 178 of the Federal Register for Monday, September 15, 1986 (pp. 32665-32667)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[DocId: 86-5]

Registration of Claims To Copyright Notice of Inquiry; Colorization of Motion Pictures

AGENCY: Library of Congress, Copyright
Office.

ACTION: Notice of Inquiry.

SUMMARY: This notice of inquiry is issued to advise the public that the Copyright Office of the Library of Congress is examining the copyright registrability of colorization (colored versions) of black-and-white motion pictures. This notice is intended to elicit public comment, views, and information which will assist the Copyright Office in developing its practices regarding colorization and may lead to proposals to amend the regulations.

DATES: Initial comments should be received on or before October 15, 1986. Reply comments should be received on or before December 15, 1986.

ADDRESS: Interested persons should submit ten copies of their written comments to Office of the General Counsel, Copyright Office, Library of Congress, Washington, D.C. 20559.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559, telephone (202) 287-8380.

SUPPLEMENTARY INFORMATION: 1. *Originality requirement for derivative works.* The existing Copyright Office regulations provide that "mere variations of . . . coloring" are not subject to copyright. 37 CFR 201.1(a).

It has been suggested,¹ and the courts have held² that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.

Original and quantitatively non-trivial contributions by an author to a preexisting work may sustain a copyright in a derivative work. *Durham Industries, Inc. v. Tomy Corporation*, 630 F.2d 905, 909 (2d Cir. 1980). A derivative work is a work "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship is a derivative work." 17 U.S.C. 101 (1982).

Copyright in a derivative work extends only to the new material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. 17 U.S.C. 103(b). The copyright in such a work is

independent of, and does not affect or enlarge the scope, duration, ownership or subsistence of any copyright protection in the preexisting material. *Ibid.* Moreover, copyright protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully. *Ibid.*, 103(a).

To be copyrightable, the new material in the derivative work must constitute an "original work of authorship." To be copyrightable, a derivative work must embody new and original creativity that makes the resulting work more than a trivial variation of the original. Thus, the quantity of new matter added is relevant to copyrightability. Courts have defined the necessary quantum of original creative authorship in different ways, ranging from "a modicum," "a minimum," or "an appreciable amount" of creative authorship. The colorization of motion pictures presents new questions concerning the registrability of claims to copyright. The Copyright Office wants to elicit the views of the public with respect of claims in colorization.

2. Colorization processes. A motion picture generally embodies the contributions of many persons whose efforts are brought together to make a cinematographic work of authorship. Copyrightable elements include audio and visual components, literary or dramatic and musical elements, integrated into a unique whole. Mere mechanical or industrial processes however have never served as the basis for original or derivative authorship. Thus, for example, a claim to copyright

¹ NIMMER ON COPYRIGHT Section 2.14 (1985).

² *Pentaca, Inc. v. A. I. Friedman, Inc.*, 284 F. Supp. 545 (S.D.N.Y. 1988); *Sargent v. American Creating 3 Corp.*, 588 F. Supp. 912, 918 (N.D. Ohio, 1984).

³ Error; line should read:

*545, 547 (S.D.N.Y. 1946); *Sargent v. American Creating*

based solely on conversion from 35mm film to one-half inch videocassette will not be registered, even though technical skill is often needed to assure faithful reproduction. In a highly technologic environment, distinguishing industrial artanship from artistic creativity is not always easy. This is, however, what the Office must do—within the limits of its overall authority—under 17 USC 410(a).

The process of colorization of black-and-white motion pictures is an attempt to respond effectively to the apparent demands and tastes of the viewing public, which tends to prefer color.

The Copyright Office is aware of sharply held differences of view on the aesthetic consequences of colorizing previously distributed black and white film. Although it follows with interest the public and industry debate as to whether colorizations risks "mutilating" the conscious artistry of black-and-white cinematographers, these issues can not and do not form any part of this present inquiry.

Colorization practices tangentially raise questions about the term of copyright. Motion picture marketing practices might, in some cases, result in the effective extension of the copyright term in copyrighted preexisting works or in the recapture of works previously in the public domain. The Copyright Office requests that parties with knowledge of industry practices address these and other possibilities.

To date, the Copyright Office is aware that at least two enterprises have ventured in the business of colorization. They are the Color Systems Technology, Inc. (hereafter "CST") of Hollywood,

California, and the Colorization, Inc. of Toronto, Canada. The systems may involve the use by "colorists" and art directors of computer data bases storing information gleaned by researchers relating to the actual color of costumes, sets, locales, and performers in black-and-white films. They apparently involve the application of colors to shots in films by individuals interacting with computers and special software. "Perfection" of the results may involve use of animation techniques. Once the colorists make certain initial decisions, the actual process of imposing color onto the entire film appears to be largely computer directed.

In addition to these computer-assisted coloring systems, another means of adding color to film exists, known as "Chromaloid." A so-called "color-retrieval" process, it does not appear to be computer-assisted.

3. *Specific questions.* To assist the Copyright Office in determining the registrability of colorized black-and-white motion pictures, comments are specifically requested on the following questions:

1. Which steps, if any, in the colorization processes involve individual creative human authorship?

2. Who are the authors of the copyrightable elements, if any, in colorized film?

3. With specific reference to the role of computer programs in colorization processes:

(a) How are colors selected? How are colors made available for selection? What factors influence color selection?

How wide is the range of choice?

(b) In addition to coloring in the strict sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in colorizing?

4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?

Copies of all comments received will be available for public inspection and copying between the hours of 8 a.m. and 4 p.m., Monday through Friday, in the Public Information Office, Room 401, James Madison Building, Library of Congress, 1st & Independence Avenue, SE., Washington, DC 20558.

If the Copyright Office decides to propose any change in the relevant regulations, it will publish a proposed text in the *Federal Register* and invite further comments at that time.

Authority: 17 U.S.C. 408, 410, and 702.

List of Subjects in 37 CFR Part 202

Claims, Copyright, Copyright Office, Registration of claims to copyright.

Dated: August 20, 1986.

Ralph Oman,

Register of Copyrights.

Approved:

Daniel J. Boerstlin,

The Librarian of Congress.

[FR Doc. 86-20712 Filed 9-12-86; 8:45 am]

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ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF REGISTRATION DECISION

COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES

The following excerpt is taken from Volume 52, Number 119 of the Federal Register for Monday, June 22, 1987 (pp.23443-23446).

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 86-1A]

Copyright Registration for Colorized Versions of Black and White Motion Pictures

AGENCY: Copyright Office, Library of
Congress.

ACTION: Notice of registration decision.

SUMMARY: This notice of a registration decision is issued to inform the public that the Copyright Office of the Library of Congress has determined that claims to copyright in certain computer-colorized versions of black and white motion pictures may be registered. The notice gives guidance to the public about the standards and practices governing registration of computer-colorized motion pictures. The notice also confirms the validity of existing regulation 37 CFR 201.1(a), prohibiting 1 copyright registration for mere variations of coloring.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559. Telephone (202) 287-8380.

SUPPLEMENTARY INFORMATION:

Registration of Colorized Black and White Motion Pictures As Derivative Works

1. Background

The Copyright Act, title 17 of the U.S. Code, defines a derivative work as "a work based upon one or more preexisting works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work." 17 U.S.C. 101 (emphasis added).

The Copyright Act also spells out that copyright protection in a derivative work "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. 103(b) (emphasis added).

An existing Copyright Office regulation provides that "mere variations of ... coloring" are not subject to copyright. 37 CFR 202.1(a). This does not preclude registration where the work contains some other elements of originality such as an original arrangement or combination of colors. Courts have held that while color *per se* is uncopyrightable and unregistrable, arrangements or combinations of colors may warrant copyright protection.¹

Between 1985 and 1986, several parties submitted the colorized versions of ten motion pictures and one television program to the Copyright Office for registration of the colorized version as a derivative work. The Copyright Office did not register any of these works. Because of the unusual nature of the claimed authorship and to obtain information about the process of creating the colorized versions from persons other than the claimants, on September 15, 1986, the Copyright Office published a Notice of Inquiry in the Federal Register (51 FR 32665) asking for comments in four specific areas.

1. Which steps, if any, in the colorization processes involve individual creative human authorship?

2. Who are the authors of the copyrightable elements, if any, in colorized film?

¹ See also 1 Nimmer on Copyright § 2.14 (1985).

1 Error: line should read;
"regulation 37 CFR 202.1(a),
prohibiting"

3. With specific reference to the role of computer programs in colorization processes:

(a) How are colors selected? How are colors made available for selection? What factors influence color selection? How wide is the range of choice?

(b) In addition to coloring in the strict sense, are other cinematographic contributions, such as animation or other hand or computer assisted effects, utilized in coloring?

4. Are all colorization processes intended solely to create videotapes in color? Are any methods now available or under development that would permit the commercially feasible colorization of 35mm prints of a quality that would permit theatrical distribution?

The Copyright Office explained that it was interested in this information in order to come to a determination of whether the coloring of black and white motion pictures is subject to copyright registration; furthermore, the Copyright Office specified that aesthetic or moral arguments about the propriety of coloring black and white film did not, and could not, form any part of its inquiry.²

2. Summary of the Comments

In all 46 comments (43 original and three reply) were filed with the Copyright Office. Despite the Copyright Office's caveat against arguments regarding aesthetic considerations, many of the comments filed related simply to the question of whether or not the commentator found the colorized motion picture aesthetically pleasing. And most did not. Other comments attempted to respond to the four question areas set out in the Notice of Inquiry.

a. *The colorization processes.* The Copyright Office noted the existence of two different types of processes in which color is added to a black and white film. One ("chromoloid") involves a color-retrieval process and the other ("colorization") adds color to individual scenes and then the entire film. The second system is the one used by both the Color Systems Technology, Inc. of Hollywood, and Colorization, Inc. of Toronto, Canada.

(1) *The chromoloid process.* In this process a fine grained black and white positive print is first reproduced by an optical printer in three distinct prints:

red, blue, and green. Then a subsequent printing process combines the three prints into a single full color film. This process was not described in any of the comments, and no films colored by this process have been submitted to the Copyright Office for registration.

(2) *The colorization process.* Both the Canadian firm, Colorization, Inc. that is associated with Hal Roach Studios, and Color Systems Technology use separately developed processes that basically involve colorization of one frame by a computer operator and then colorization of each succeeding frame in the entire scene by the computer.

The first step of the colorization process is to transform a pristine black and white print to a videotape. This videotape is then broken down into discrete scenes and sequences. A color plan is developed for each scene as well as the entire videotape. The spectrum of colors initially available is virtually unlimited,³ but colors are generally selected to convey a particular time period, to create a certain mood, and to be faithful where possible to the coloring of the actors and actresses involved.

Next an artist uses a computer controlled graphics tablet and an electronic palette to hand-color key frames. Then a high-speed computer is directed to color the intervening frames, gearing adjustments to variations in the luminosity of the black and white original.

Each color converted scene is reviewed and revisions are made where necessitated, e.g., where dictated by a change in one of the intervening frames not consistent with the hand-colored key frame.

b. *Original authorship.* Although the general public response was against copyright registration on aesthetic grounds, the consensus of those who responded regarding the legal issue of original authorship was that colorized versions of black and white motion pictures satisfied the copyright law's standard for copyright subject matter. They based this argument on the position that the creation of a computer color version is a process that involves individual creative human authorship and requires an amount of technical or artistic judgment that meets copyright law standards of original, creative expression. One justification was that all of the steps involved in colorization involve human authorship since the

process is directed by human operators who follow the dictates of a human art director. The more prevalent justification is that the selection, coordination and application of color, and the review of the final product amount to "individual creative human authorship."

Those opposed to copyright registration asserted that colorizing is a technical process that does not have sufficient *human* authorship to merit copyright protection. This commentator examined three steps involved in the process: color selection, the data base, and the computer program and argued that none justify registration of colorized films under the following tests for derivative works claims:

(1) Are they based on more than ideas or mere facts and

(2) If so, are they based on more than trivial variations in the actual expression of an underlying work, these being both

(a) Attributable to original authorship and

(b) Representing a modicum of creativity.

As to color selection the opponents claimed that an artist's selection of palette is an idea that has not as yet produced any copyrightable expression. As to the "data base," this party noted that copyright does not cover the factual content of a work and contended that it is the color facts in the data base which are integrated into a preexisting visual pattern of the black and white film that is being reprocessed. These patterns, it was argued, serve as the actual expression in the new video product, which merely organizes the facts previously compiled in a different order. Furthermore, the opponents argued that "the protectible forms in which the facts were once compiled, that is, expressed and organized, say, as a computer-readable data base, will, in the final video product, be quite simply left behind. . . ." Finally, the opponents asserted that copyright in a computer program cannot also support a claim in the product or output of the program—in this case the color-recoded film.

Several commentators raised the issue of whether only the handcolored scenes and not those done by computer are copyrightable. Another related issue is even if sufficient human authorship exists given today's colorization technology, what happens to a copyright claim when the complete coloring process is done by a computer program?

3. Appropriate Judicial Standard

Proponents and opponents would probably agree that whether or not a derivative work will support a copyright depends upon whether it is a distinguishable variation or merely a trivial variation. See *L. Batlin and Son v.*

² Copyright registration determinations cannot be made on aesthetic grounds. Original works of authorship that meet the legal and formal requirements of the Copyright Act are entitled to registration, irrespective of their artistic worth. Moreover, the present federal copyright law does not extend protection to the so-called "moral right" of an author to prevent the distortion or mutilation of the work, after transfer of the copyright.

³ The comment of Colorization, Inc. alleges that selections are made from a palette of 16 million colors, from which 4,096 colors are selected for each movie and 64 colors for each scene.

Snyder, 536 F.2d 488 (2d Cir. 1976), cert. denied, 429 U.S. 857 (1976). The disagreement between the two sides centers on what makes a variation distinguishable and also on whether a higher standard is required for a derivative work, especially if it is based on a work that is already in the public domain.

The second circuit held in the *Batlin* case that a higher standard exists for determining copyrightability of contributions to public domain works. Later this same court said that copyright for derivative works is subject to two related and important limitations:

1. To support a copyright the original aspects of a derivative work must be more than trivial.
2. The scope of protection afforded a derivative work must reflect the degree to which it relies on the preexisting material and must not in any way affect the scope of any copyright in this preexisting material.

Durham Industries, Inc. v. Tomy Corporation, 630 F.2d 905, 909 (2d Cir. 1980).

The seventh circuit has also indicated that a higher standard of originality is required in derivative works in order to prevent the first creator of a derivative work from interfering with the right of subsequent authors to depict the underlying work without fear of copyright problems. *Groen v. Bradford Exchange*, 698 F.2d 300 (7th Cir. 1983).

Proponents of copyright for computer-colored films assert that the *Groen* case is a misreading of *Batlin*, that *Batlin* grapples with the problem of substantial similarity in the case of works grounded in common antecedents, and that the ruling does not deny copyright registrability to colorized motion pictures which meet the tests of original authorship as set out in *Batlin* and other cases.

Opponents of copyright in computer-colored films argue that colorizing a film does not meet the *Batlin* test for authorship in derivative works. They interpret *Batlin* as distinguishing between human contributions that require sustained "artistic skill and effort" and those that exhibit only "physical skill" or technical competence. The former could be copyrightable; the latter would not.

Before the *Batlin* case was decided, a district court upheld the copyrightability of a compilation of colors on the basis of color selection which the court found to require "careful consideration of numerous artistic factors including the aesthetic attributes of each shade and its use in the commercial art field." *Pantone Inc. v. A. J. Friedman Inc.*, 294 F.Supp. 545, 547 (S.D.N.Y. 1988).

4. Registration Decision

After studying the comments

responsive to the questions listed above, the Copyright Act, and the case law, the Copyright Office has concluded that certain colorized versions of black and white motion pictures are eligible for copyright registration as derivative works. The Office will register as derivative works those color versions that reveal a certain minimum amount of individual creative human authorship. This decision is restricted to the colorized films prepared through the computer-colorization process described above. No comments were received regarding the chromoloid process, and no claims are pending before the Copyright Office. The record before us does not contain sufficient information to make a decision regarding chromoloid films.

The Copyright Office finds that the issue of copyright in computer-colored films requires a difficult determination of the presence of original authorship. The policy of the existing regulation prohibiting registration for "mere variations . . . of coloring" is sound and fully supported by case law. *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp.*, 288 F.2d 541, 544-545 (2d Cir. 1959); *Manes Fabric Co., Inc. v. The Acadia Co.*, 139 U.S.P.Q. 336, 340 (S.D.N.Y. 1980); *Christianson v. West Publishing Co.*, 53 F. Supp. 454, 455 (N.D. Calif. 1944), *aff'd* 149 F.2d 202 (9th Cir. 1945). The regulation is applied by the Copyright Office to deny registration when the only authorship claimed consists of the addition of a relatively few number of colors to an existing design or work. The regulation also prohibits registration of multiple colored versions of the same basic design or work. Registration is not precluded, however, where the work consists of original selection, arrangement, or combinations of a large number of colors, or where the lines of an original design are fired by gradations of numerous colors. The Copyright Office finds that these registration practices are consistent with the standards of original authorship set by the Copyright Act, and we affirm the validity of the existing regulation.

The Office concludes that some computer-colored films may contain sufficient original authorship to justify registration, but our decision is a close, narrow one based on the allegations that the typical colorized film is the result of the selection of as many as 4000 colors, drawn from a palette of 16 million colors. The Office does not consider registration would be justified based on a claimed "arrangement" or "combination" of the colors because the original black and white film predetermines the arrangement of colors. The Office is concerned about implications of registering a claim to

copyright in public domain films based on colorizing, and we address that point below. Our decision is also limited to existing computer-coloring technology. We will monitor technological developments, and may reconsider the issue if the role of the computer in selecting the colors becomes more dominant.

The general standard for determining whether the color added to a black and white motion picture is sufficient to merit copyright protection is the statutory standard that already applies to all derivative works, i.e. "modifications" to a preexisting work "which, as a whole, represent an original work of authorship." 17 U.S.C. 101. In determining whether the coloring of a particular black and white film is a modification that satisfies the above standard, the Office will apply the following criteria:

- (1) Numerous color selections must be made by human beings from an extensive color inventory.
- (2) The range and extent of colors added to the black and white work must represent more than a trivial variation.
- (3) The overall appearance of the motion picture must be modified; registration will not be made for the coloring of a few frames or the enhancement of color in a previously colored film.
- (4) Removal of color from a motion picture or other work will not justify registration.
- (5) The existing regulatory prohibition on copyright registration based on mere variations of color is confirmed.

When registration is warranted, the copyright will cover only the new material, that is, the numerous selections of color that are added to the original black and white film. The copyright status of the underlying work is unaffected. The black and white film version will remain in the public domain or enter the public domain as dictated by its own copyright term. When an underlying work is in the public domain, another party is free to use that work to make a different color version which may also be eligible for copyright protection.

List of Subjects in 37 CFR Part 202

Claims, Claims to copyright, Copyright registration.

A proposed rule on deposit of computer-colored films will be published separately.

Dated: June 11, 1987.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 87-14081 Filed 6-19-87; 9:45 am]

BILLING CODE 1410-07-01

NOTICE OF PROPOSED RULEMAKING

COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES; PROPOSED RULEMAKING

The following excerpt is taken from Volume 52, Number 121 of
the Federal Register for Wednesday, June 24, 1987 (pp23691-23692)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. RM 86-1B]

Copyright Registration for Colorized Versions of Black and White Motion Pictures; Proposed Rulemaking

AGENCY: Copyright Office, Library of
Congress

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice of proposed
rulemaking is issued to inform the public
that the Copyright Office of the Library
of Congress has determined that claims
to copyright in certain computer-
colorized versions of black and white
motion pictures may be registered upon
compliance with proposed new deposit
requirements. The notice informs the
public and invites comment with respect
to proposed regulations that would
require the deposit of a black and white
print along with a copy of the computer-
colorized version in order to register a
claim to copyright in the selection of
colors.

DATES: Written comments should be
received on or before July 24, 1987.

ADDRESSES: Ten copies of written
comments should be addressed, if sent
by mail, to: Library of Congress,
Department 100, Washington, DC 20540;
if delivered by hand, copies should be
brought to: Office of the General
Counsel, U.S. Copyright Office, James
Madison Memorial Building, Room 407,
Washington, DC.

FOR FURTHER INFORMATION CONTACT:
Dorothy Schrader, General Counsel,
Copyright Office, Library of Congress,
Washington, DC 20540. Telephone (202)
287-6380.

SUPPLEMENTARY INFORMATION:

Registration of Colorized Black and
White Motion Pictures As Derivative
Works

1. Background

An existing Copyright Office
regulation provides that "mere
variations of coloring" are not subject to
copyright. 37 CFR 202.1(a). This does not
preclude registration where the work
contains some other elements of
originality such as an original
arrangement or combination of colors.
Courts have held that while color *per se*
is uncopyrightable and unregistrable,
arrangements or combinations of colors
may warrant copyright protection.¹

Between 1985 and 1986, several
parties submitted the colorized versions
of ten motion pictures and one television
program to the Copyright Office for
registration of the colorized version as a
derivative work. The Copyright Office
did not register any of these works.
Because of the unusual nature of the
claimed authorship and to obtain
information about the process of
creating the colorized versions from
persons other than the claimants, on
September 15, 1986, the Copyright Office
published a Notice of Inquiry in the
Federal Register (51 FR 32865) and
invited public comment regarding the
registrability of colorized films.

In all 46 comments (43 original and
three reply) were filed with the
Copyright Office. After studying the
comments, the Copyright Act, and the
case law, the Copyright Office
concluded that certain colorized
versions of black and white motion
pictures are eligible for copyright
registration as derivative works. On
June 22, 1987 the Copyright Office
published its decision regarding
registration for computer-colorized films
at 52 FR 23443. We stated that proposed
deposit requirements for registration of
computer-colorized films would be
published separately. The purpose of
this Notice is to propose such rule and
invite public comment on them. 1

¹ See also 1 NIMMER ON COPYRIGHT § 3 section
2:14 (1985).

1 Error: line should read;
"this Notice is to propose such
rules and "

2. Deposit of Black and White Version

To facilitate examination of the claim
to copyright in the computer-colorized
version, at least one commentator
suggested that the Copyright Office
should require the deposit of a black
and white version as well as a colorized
copy. Authority for this requirement
exists under the general rulemaking
authority of 17 U.S.C. 702. In addition,
the Register of Copyrights is specifically
authorized to specify by regulation, the
"nature of the copies or phonorecords to
be deposited in the various classes
specified." 17 U.S.C. 403(c)(1).

The Copyright Office has decided to
propose regulations that would require
claimants of copyright in computer-
colorized versions of motion pictures to
deposit one copy each of the colorized
version and of the black and white print
from which the colorized version was
prepared. Comparison of both copies
will enable an examiner to determine
better whether the colorized version
satisfies the applicable standards for
copyright registration. Deposit of the
black and white version will also enrich
the collections of the Library of
Congress since in many cases the older
black and white films were never
registered or otherwise deposited with
the Library.

3. Regulatory Flexibility Act Statement

With respect to the Regulatory
Flexibility Act, the Copyright Office
takes the position that this Act does not
apply to Copyright Office rulemaking.
The Copyright Office is a department of
the Library of Congress and is a part of
the legislature branch. Neither the
Library of Congress nor the Copyright
Office is an "agency" within the
meaning of the Administrative
Procedure Act of June 11, 1946, as
amended (Title 5 Chapter 5 of the U.S. 2
Code, Subchapter II and Chapter 7). The
Regulatory Flexibility Act consequently

2 Error: line should read;
"amended (title 5 Chapter 5 of
the U.S."

does not apply to the Copyright Office 3
since that Act affects only those entities
of the Federal Government that are
agencies as defined in the 4
Administrative Procedure Act.⁵

⁵ The Copyright Office was not subject to the
Administrative Procedure Act before 1976, and it is
now subject to it only in areas specified by section
701(a) of the Copyright Act (i.e., "all actions taken
by the Register of Copyrights under this title [17]."
except with respect to the making of copies of
copyright deposits). [17 U.S.C. 701(b)]. The
Copyright Act does not make the Office an
"agency" as defined in the Administrative 5
Procedure Act. For example, personnel actions
taken by the Office are not subject to APA-FOIA
requirements.

Alternatively, if it is later determined
by a court of competent jurisdiction that
the Copyright Office is an "agency"
subject to the Regulatory Flexibility Act,
the Register of Copyrights has
determined and hereby certifies that this
proposed regulation will have no
significant impact on small businesses.

List of Subjects in 37 CFR Part 202

Claims. Claims to copyright. Copyright 6
registration.

Proposed Regulations

In consideration of the foregoing, the
Copyright Office proposes to amend Part
202 of 37 CFR, Chapter II.

1. The authority citation for Part 202
would continue to read as follows:

Authority: Copyright Act, Pub. L. 94-553, 90
Stat. 2541 [17 U.S.C. 701].

2. Section 202.20(c)(2)(ii) would be
amended by adding the following
sentence at the end thereof:

§ 202.20 Deposit of copies and phonore 7
cards for copyright registration.

(c) * * *
(2) * * *

(ii) *Motion pictures.* * * * In the case of
colorized versions of motion pictures
made from pre-existing black and white 8
motion pictures, in addition to the
deposit of one complete copy of the
colorized motion picture and the
separate description of its contents as
specified above, the deposit shall
consist of one complete print of the
black and white version of the motion
picture from which the colorized version
was prepared.

Dated: June 18, 1987.

Ralph Oman,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 87-14362 Filed 6-23-87; 8:45 am]

SELLING CODE 1410-20-07

3 Error: line should read;
"does not apply to the Copyright
Office"

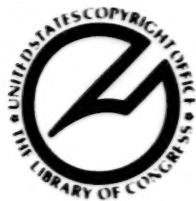
4 Error: line should read;
"agencies as defined in the"

5 Error: line should read;
"agency" as defined in the
Administrative"

6 Error: line should read;
"Claims, Claims to Copyright,
Copyright Registration"

7 Error: line should read;
"§ 202.20 Deposit of copies and
phonorecords for copyright
registration"

8 Error: line should read;
"made from pre-existing black and
white"



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

REQUEST FOR INFORMATION; NOTICE OF HEARING

REQUEST FOR INFORMATION; NOTICE OF HEARING, NEW TECHNOLOGY AND AUDIOVISUAL WORKS.

The following excerpt is taken from Volume 53, Number 101 of the Federal Register for Wednesday, May 25, 1988 (pp.18937-18938)

LIBRARY OF CONGRESS

Copyright Office

(Docket RM 88-3)

Request for Information; Notice of Hearing, New Technology and Audiovisual Works

AGENCY: Library of Congress, Copyright Office.

ACTION: Request for information; notice of hearing, new technology and audiovisual works.

SUMMARY: The Copyright Office of the Library of Congress issues this request for information to advise the public that it is inquiring and intends to hold a public hearing on issues concerning how new technologies such as colorization, time compression, and panning-and-scanning affect the creation and uses of audiovisual works, including motion pictures and television programming. This notice invites participation in a public hearing intended to elicit comments, views, and information that will assist the Office in understanding the extent of the present use of these new technologies in conjunction with audiovisual works, the problems, if any, that this technology may create for both the integrity of our national film heritage and the creative freedom of filmmakers, as well as the extent such technologies are expected to be used in the future and their impact on consumers, artists, producers, distributors, and other affected individuals and industries. Written comments are also solicited.

The Office particularly invites comment from or participation by

representatives of organizations of individuals involved in creating audiovisual works; with distributors, broadcasters and other commercial interests that exploit such works or own copyright interests in them; with consumers, institutional film collectors, archivists, academics, libraries, and government agencies.

DATE: The hearing will be held on September 8, 1988 in Washington, DC. Anyone desiring to testify should contact the Office of the Register of Copyrights at (202) 287-8350 by August 24, 1988. Ten copies of written statements should be submitted to the Copyright Office by 4:00 p.m. on August 17, 1988, if possible, and in any case no later than August 24, 1988. Written comments are also invited from persons who do not wish to testify, and should be submitted by September 22, 1988.

ADDRESSES: The hearing will be held on September 8, 1988 in the Mumford Room of the James Madison Memorial Building (LM-649), Sixth Floor, Library of Congress, First and Independence Avenue, SE., Washington, DC, beginning at 9:30 a.m.

Ten copies of written statements, supplementary statements, or comments should be submitted as follows:

If sent by mail: Library of Congress, Department 100, Washington, DC 20540.

If delivered by hand: Office of the Register of Copyrights, Copyright Office, James Madison Memorial Building, Room 403, First and Independence Avenue, SE., Washington, DC 20559.

All requests to testify should clearly identify the individual or group desiring to testify.

FOR FURTHER INFORMATION CONTACT:

William Patry or Eric Schwartz, Policy Planning Advisors to the Register of Copyrights, Copyright Office, Library of Congress, Washington, DC 20559. Telephone: (202) 287-8350.

SUPPLEMENTARY INFORMATION: At the request of the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, the Copyright Office is conducting an inquiry and preparing a report on the effect new technologies such as colorization, time compression, and panning-and-scanning have on the creation and exploitation of audiovisual works, including motion pictures and television programming.

On June 22, 1987 the Copyright Office issued a Notice of Registration Decision regarding claims to copyright in certain computer-colored versions of black and white motion pictures. 52 FR 23443-23446. The Notice informed the public that, after having received and reviewed 46 comments about the nature of claimed authorship in and the process of creating computer-colored versions of black and white motion pictures, the Office had concluded that some computer-colored films may contain sufficient authorship to justify registration. The standard to be applied in determining whether the color added to a black and white motion picture satisfies the originality standard for protection is that which already applies to all other derivative works: i.e., modifications "which, as a whole, represent an original work of authorship." 17 U.S.C. 101 (definition of "derivative work"). The notice then enumerated five criteria the Office

would apply in determining whether the coloring of a particular black and white film is a modification that satisfies this statutory standard. The Notice of Registration Decision noted that registration determinations cannot be made on aesthetic grounds and, accordingly, that aesthetic or moral arguments about the propriety of coloring black and white films did not form any part of the inquiry.

On June 24, 1987, the Office published a separate notice of proposed rulemaking regarding the deposit requirements for colorized versions of black and white motion pictures. 119 FR 23891-23892.

This notice does not seek additional comments regarding the registrability of computer-colored versions of black-and-white audiovisual works. Instead, it seeks information concerning the nature, extent, and effect of these new technologies on creators, distributors, and the public.

Specifically, the Office seeks comments in the following areas:

1. Nature and Impact of the Technology

The Office would appreciate information regarding:

a. Description of the technologies of colorization, time compression, and panning-and-scanning and how and why these techniques are utilized after the creation of an audiovisual work.

b. What considerations are taken into account in deciding whether to use these technologies—commercial, aesthetic, or other factors? How does the use of these technologies affect the integrity of and economic rewards flowing to those involved in the creation of the original work (including but not limited to the director, producer, actors, cinematographers, screenplay authors,

soundtrack composers, and set designers)? Have these individuals objected to the use of these technologies, and, if so, how have the objections been resolved?

c. What is the present extent of the use of the technologies and what is the present impact of the technologies on those involved in the distribution of the original and the altered versions of the work? What is the projected future use and impact of these technologies? Are there similar technologies currently in the planning or development stages, and, if so, what is their projected use and impact?

d. What is the impact of the new technologies on public access to audiovisual works? Do they increase or decrease demand for or availability of the original? Do the new technologies have different impact depending upon the medium of distribution; e.g., theatrical distribution, home videocassette sale or rental, and cable or other pay TV mechanisms?

2. Contractual Practices

Do existing contractual or collective bargaining agreements govern the nature and extent of the use of the new technologies, and if not, why not? Are there differences in contract provisions negotiated by established creators and those negotiated by lesser-known artists?

3. Foreign Practices

Have foreign countries addressed any of the issues raised by these new technologies, and if so, how, and are these foreign practices relevant or applicable to practices in the United States?

4. Possible Future Legislative Action

Is there a need for additional legislation to solve the problems caused by the new technologies or should the private contractual or collective bargaining process be relied upon? Would additional legislation upset existing contractual relationships or raise constitutional issues with respect to restrictions on the exploitation of existing rights? If legislation is believed to be necessary and appropriate, what form should it take—federal (e.g., amendments to the Copyright Act or the Lanham Act) or state (e.g., state moral rights statutes) and who should be protected—only the principal director or screenwriter of the original work, or all others involved in the creative process, e.g., the actors, the cinematographers, the screenplay authors, the soundtrack composers, and the set designers? Is it possible or desirable to distinguish between works which should be protected? Should protection be limited to recognized classics, and, if so, how should it be determined if a work is a classic or otherwise deserving of protection?

Copies of all comments received will be available for public inspection and copying between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday, in Room 401, James Madison Memorial Building, Library of Congress, First and Independence Avenue, SE., Washington, DC 20540.

Dated: May 13, 1988.

Approved:

James H. Billington,

The Librarian of Congress.

[FR Doc. 88-11705 Filed 5-24-88; 8:45 am]

BILLING CODE 1410-07-01



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

FINAL REGULATION

COPYRIGHT REGISTRATION FOR COLORIZED VERSIONS OF BLACK AND WHITE MOTION PICTURES; FINAL RULE

The following excerpt is taken from Volume 53, Number 153 of
the Federal Register for Tuesday, August 9, 1988 (pp. 29887 - 29890)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. FR 88-18]

Copyright Registration for Colorized Versions of Black and White Motion Pictures; Final Rule

AGENCY: Copyright Office, Library of
Congress.

ACTION: Final regulation.

SUMMARY: The Copyright Office of the
Library of Congress is adopting a final
rule with respect to the deposit of a
black and white print of a motion
picture along with a copy of the
computer colorized version in order to
register a claim to copyright in the
colorized version. This is intended to
improve the ability of the Copyright
Office to process applications to register
claims to copyright.

EFFECTIVE DATE: August 9, 1988.

FOR FURTHER INFORMATION CONTACT:
Dorothy Schroder, General Counsel,
Copyright Office, Library of Congress,
Washington, DC 20540. Telephone (202)
287-8380.

SUPPLEMENTARY INFORMATION: On June
22, 1987, the Copyright Office announced
its decision to register certain colorized
versions of black and white motion
pictures (52 FR 23443). Two days later,
the Office published a proposed rule
that would require the deposit of a black
and white print along with a copy of the
computer-colorized version in order to
register a claim to copyright in the
selection of colors. (52 FR 23891).

Interested persons were asked to
comment on the proposed rule.

Six comment letters were submitted.
Two of these objected to the decision to
register claims to copyright in the
colorized version. For the reasons given
in the June 22, 1987 registration decision,
the Office maintains the view that
certain colorized films can satisfy the
original work of authorship standards of
the copyright law.

Of the other four comments, one
represents the attorney's own views;
two represent groups who are making
colorized versions; and the fourth is
characterized as a summary of
responses to the proposed rule made by
thirteen members of the Copyright
Office Affairs Committee of the Patent,
Trademark and Copyright Section of the
American Bar Association ("ABA").¹
These comments specifically address
the proposed deposit regulation by
questioning in one way or another the
Copyright Office's authority to make
such a rule, the wisdom of requiring the
comparison of the two versions in the
examination process, or the necessity of
requiring a black and white print as a
deposit instead of a black and white
videotape. They also raise other issues
related to this rulemaking.

¹ The Chairman of this Committee mailed a cover
letter summarizing up his views and past discussion to
each member with a space provided for each
member to check a box denoting whether he or she
agreed with the proposed rule or believed the
Committee should oppose the rule. A space was
also provided for each member to comment on the
rule. It is not clear from the comment submitted to
the Copyright Office, primarily a distillation of the
views set out in the Chairman's cover letter, how
many members made individual comments.

1. The Authority Issue

One attorney questions whether the
Copyright Office, a legislative branch
agency, should exercise what he
characterizes as even broader
administrative and executive functions.
He contends that the proposed rule on
deposit violates both the letter and the
spirit of the copyright statute. Eleven of
the thirteen ABA committee members
who responded felt that the Office lacks
the statutory authority to establish the
proposed deposit requirement. On the
other side, two ABA members including
a law professor felt the Copyright Office
had sufficient authority to do so. The
comments submitted on the behalf of
colorizers indicate a willingness to¹
deposit a black and white copy of the
motion picture for the benefit of the
public without conceding the Office's
authority to require one, provided the
requirements are reasonable.

The Copyright Office finds that
authority for requiring a black and white
copy in addition to the colorized copy
exists under both the general rulemaking
authority of 17 U.S.C. 702 and the
specific authority given to the Register
of Copyrights to specify by regulation,
the "nature of the copies or
phonorecords to be deposited in the
various classes specified." 17 U.S.C.
408(c)(1). In *National Conference of Bar
Examiners v. Multistate Legal Studies,
Inc.*, 682 F.2d 478 (7th Cir. 1982), the
Seventh Circuit found that the Copyright
Act "vest[s] broad authority in the
Register of Copyrights to fashion a
workable system of registration and
deposit of copyrighted works." 682 F.2d
at 484. It is clear that the deposit
requirements serve many purposes:
examination of claims; evidence of the

¹ Error; line should read:
"colorizers indicate a willingness to"

identity, content, and scope of the registered work for litigation and commercial transaction purposes; and enrichment of the collections of the Library of Congress for contemporary users (both the general public and the Congress) and for posterity. The Register of Copyrights is vested with broad authority to establish reasonable deposit requirements that take account of the varied, and sometimes conflicting, purposes of the registration-deposit system.

When the Copyright Office announced its decision to register certain colorized versions of black and white prints, it specified a set of criteria it would use to determine whether the color added to a black and white motion picture is a modification of a preexisting work "which, as a whole, represent(s) an original work of authorship." 17 U.S.C. 101. One of those criteria is that the color added be more than a trivial variation. Another confirms the existing regulatory prohibition on copyright registration based on mere variations of color.

After examination of all of the comments submitted in response to the original Notice of Inquiry and to the proposed regulation, the Copyright Office concludes that the deposit of a black and white film version will facilitate the examination necessary to determine that the colorized version for which registration is sought is more than a trivial variation. Color conversion of films by computer clearly represents a new way of creating derivative works. The Office has stated that it will monitor technological developments to assess further the quantity of human authorship and the degree of control the "technician-author" exercises in relation to the computer. The Office could have adopted other requirements to gain information that would assist in the examination of claims, such as affidavits or other paper documentation. The deposit requirement selected by the Office has the advantage both of facilitating examination to ascertain the fact of original authorship in the colorized version compared to the previous versions of the film, and of enriching the collections of the Library of Congress for the benefit of the public and posterity.

The Office has considered the expense and possible inconvenience to registrants of requiring deposit of the black and white copy. The Office notes that the colorization process itself is expensive. The average cost is \$180,000 to \$200,000 per film. The cost of a print for registration is modest in comparison, especially when one also considers the value of the intellectual property protected by the registration.

With respect to convenience, in order

to make the colorized version, the colorizer must already have access to the black and white version; and, as a rule, this will be a celluloid print. In those cases where the particular copy does not satisfy the archival standards of the Library, special relief may be requested, based on a proposal to deposit the best available, near-archival quality black and white print.

Precedent exists for requiring supplementary or identifying deposit materials in addition to the copy of the work for which registration is sought. In the case of motion pictures, the Copyright Act of 1909 required the deposit of a description of the work in addition to photographs or prints: the regulations issued in 1978 require deposit of a separate description of the contents, such as a continuity or presebook, in addition to one complete print. When the Copyright Office first registered claims to copyright in computer programs in 1984, the Office² required deposit of two machine-readable copies, a complete print-out in human-readable form, and any accompanying manuals, flow charts, or other documentation. Like computer program registration in 1984, registration of computer-colorized motion pictures in the 1980's presents the Office with difficult, new copyright examination issues. The deposit requirement adopted today is responsive to the unique nature of the computer-colorizing process.

2. Comparison of Different Versions

Two comments question the wisdom of allegedly establishing a precedent by comparing the original work and the derivative work to determine the copyrightability of the derivative work.

One comment asserts that if such a practice is limited to colorized motion pictures, it is discriminatory. The commentator maintains that although the proposed deposit rule is not "expressly forbidden," Copyright Office practice and the Compendium of Copyright Office Practices "make it clear that the examination process is not intended to include the making of comparisons." He quotes a pre-1978 regulation which said that the Office does not make comparisons "to determine similarity of works." He also cites a current Compendium statement that the Office does not "generally make comparisons of copyright deposits to determine whether or not particular material has already been registered." *Compendium II Copyright Office Practices*, 108.03. (Emphasis added).

The other comment that addresses this issue reports that most of the ABA members who oppose the proposed deposit rule feel that examination of the derivative work by comparison with the original would establish a dangerous precedent. Some of them also expressed

the fear that the Copyright Office is moving toward a patent type examination. To the contrary, another ABA respondent asserted that he had already considered all of these arguments, and still felt the proposed deposit requirement to be a good one that would not "place the Copyright Office on a 'slippery slope' toward becoming anything that even begins to approximate the Patent and Trademark Office."

The Copyright Office has considered these arguments especially in light of the grounds asserted for registration of claims to copyright in colorized versions of films. The Copyright Act specifies that the issuance of the certificate follows the examination and determination that "the material deposited constitutes copyrightable subject matter" * * * 17 U.S.C. 410(a). Moreover, "the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. 410(c). The Compendium specifies in section 108.01 that examination is made to determine:

- (1) Whether or not the work for which registration is sought constitutes copyrightable subject matter and
- (2) Whether or not legal and formal requirements have been met * * *

The arguments based on the pre-1978 regulation or section 108.03 of the Compendium are not persuasive. Like existing 37 CFR 201.2(a)(1), the pre-1978 regulation cited by one commentator applies to "information given by the Copyright Office," in response to requests from a member of the public. Neither regulation applies to examination of claims to copyright, which is governed by regulations set forth at 37 CFR Part 202 and by the *Compendium*. Section 108.03 would apply to a situation where there is a possibility that more than one colorized version of the same black and white film may exist. In that case the Copyright Office would not "generally" make a comparison based on determining whether a prior colorized version has already been registered, although it may do so occasionally—hence we use the qualifying term "generally."

Thus, even if section 108.03 were applicable, it merely states a general practice that admits of exception. While the practice may not be generally known, in fact, the Copyright Office does occasionally compare previously registered works in examining a given claim. We have done so for several decades. The application forms have long requested disclosure of a previous registration (including the registration number) where registration is sought for a derivative work. The comparison is

² Error; line should read:
"computer programs in 1984, the Office"

made depending on a number of factors, including the nature of the work, the nature of the authorship claimed as new matter, the availability of the prior registered copy, whether the registration number is known, whether the copy of the pending work discloses information that presents a registration issue (e.g. the year date in the notice) that may be resolved by review of the previously registered work, and so forth. In the past, comparisons have been made especially between unpublished music and published music claims, between ad interim books and the American edition, and between original term works and renewal applications for such works.

The Copyright Office is not embarking, and does not seek to embark, upon a patent or trademark-like examination. The regulations we are adopting will ensure that a Copyright Office examiner will have the necessary material to determine whether the colorized version is more than a trivial variation of the original film from which it is derived. The Office will examine each colorized version on its own merits in relation to the material each added to the original black and white film.

3. The Necessity of Requiring a Black and White Print

Three comments are directed to the burden imposed on the registrant of a colorized version by requiring a deposit of a black and white print. One comment argues that if this deposit requirement is retained, it must be recognized as "ancillary" and cannot impose any "meaningful burden" on the copyright owner. Another urges that the proposed deposit rule "imposes a burdensome and expensive" requirement on one type of derivative work. The third comment asserts that real practical impediments exist:

1. No single print of the underlying work may exist.
2. The registrant may not own the black and white print.
3. It would be "extremely difficult, and prohibitively expensive, to produce a 'complete print' of the version upon which the colorized version was based."

Two of these comments assert that the person making the deposit should be given the option of depositing either a videotape or a print of the black and white version. One of them suggests that the regulations could require deposit of "one viewable copy of the black and white motion picture upon which the color-converted version is based." The other insists that a balance is needed to accommodate the needs of the Copyright Office and the Library of Congress without burdening the copyright owner.

On the other side, a film group opposed to registration of colorized film

urges that only black and white print is acceptable. This group observes that the black and white videotape used to produce colorized versions "is intentionally printed with low contrast to facilitate colorization" and says that the proposed rule does not recognize the "crucial differences in format" between the colorized motion picture, which exists only on videotape, and the original black and white film, which exists in celluloid. It emphasizes that the black and white videotape is unsuitable for archival purposes and questions whether any tape, black and white or color, is a viable form of deposit for archival purposes since it has a short shelf life especially when compared to celluloid print.

While only six parties responded to the proposed new regulation, forty-three responded to the original inquiry concerning registrability. A majority of the individuals who responded to the original inquiry characterized colorization as a desecration of the original black and white film, and many of them expressed the fear that the original black and white film would be lost to posterity. In legislative hearings, colorizers assured the congressional copyright subcommittees that colorizing not only enhances the quality of the old black and white film, but also ensures that the old film will be preserved and will always be available in its original form.³

In the original comment period, several of those who supported registration of the colorized version, also saw the need for deposit of the black and white print. The Copyright Office preliminarily concluded that such a deposit would serve two purposes: To enable the examiner to determine better whether the colorized version satisfies the applicable standards for copyright registration, and to enrich the collections of the Library of Congress since in many cases the older black and white films were never registered or otherwise deposited with the Library.⁴

³ See Hearing on Colorization Before the Subcommittee on Technology and Law of the Senate Judiciary Committee, May 12, 1987, (statement of Roger L. Mayer, President, Turner Entertainment Co.) (statement of Rob Word, Senior Vice President, Creative Affairs, Corporate Officer, Hal Roach Studios, Inc.) (hereafter "1987 Senate Hearing").

⁴ The gaps in the Library's collection exist primarily with respect to 1930's and 1940's films. Before the introduction in 1942 of the special contractual arrangement, known as the Motion Picture Agreement, many films were not registered; the films could not be acquired through the demand deposit provisions of the Copyright Act of 1909 because the films were arguably unpublished under that former law. Contrary to the assertion of one commentator, the Motion Picture Agreement has been a vehicle for filling gaps in the collection, and is not the cause of the gaps.

Both in this administrative proceeding and in congressional hearings, one or more proponents of colorization stated that they obtained the best quality print of the original black and white film before transferring it to a black and white videotape. Representations were made that restoring the black and white print sometimes meant re-assembling the film by putting together several flawed prints, restoring lost reels, putting the restored work on 35mm, or transferring 35mm nitrate stock to safety stock. In the words of a representative of Hal Roach Studios, "That cost a lot of money. We would not be doing this if we did not feel that we could at least get our money back through colorizing the film. But besides that, we are taking a film that nobody really cared about, preserving it, giving it lasting value and making it available to the public in both black and white and color." This spokesperson went on to say that Hal Roach "has a tremendous film library."⁵

Hal Roach Studios now asserts that it would be extremely difficult, and prohibitively expensive, to produce a "complete print of the version upon which the colorized version was based."⁶

On the other hand, film archivists assert that a black and white videotape will not serve any use for archival purposes. Moreover it would be much more expensive for the Library of Congress to take a black and white videotape and transfer it to a print that would be viable for archival purposes than it would be for the colorizer to prepare a print for deposit. Ultimately the deposit of the black and white videotape would satisfy only one of the purposes the Copyright Office foresaw in proposing the new rule—the examination purpose. Moreover, such a deposit would do nothing to assure for posterity that the black and white prints will be preserved.

On balance, the Copyright Office has decided to adopt the proposed amendment modified by a reference to special relief. Upon a showing in a particular case that the registrant does not own an archival quality print or that it would be prohibitively expensive to prepare a new archival quality print where none is otherwise available, the Copyright Office will consider deposit under special relief. The claimant must in such cases make a good faith effort to deposit the best available, near-archival quality print. Special relief to deposit a black and white videotape will be granted only where a celluloid print is demonstrably unavailable. Given the previously noted representations of the colorizers regarding their acquisition or

⁵ 1987 Senate Hearing, Statement of Rob Word.

⁶ RM 88-1B, Comment 6.

development of archival-like quality black and white prints, we would expect that ordinarily special relief is unnecessary.

4. Related Issues

(a) *Availability of the Motion Picture Agreement.* One comment requests clarification of whether a form of the Motion Picture Agreement will be available for black and white deposits. The Motion Picture Agreement does not apply to these deposits. The Agreement was developed to encourage timely registration of a motion picture without requiring the registrant to keep a print out of circulation at the very time that the motion picture was being exhibited for the first time. Such a consideration does not exist here where the registrant is planning primarily to exhibit the colorized videotape version.

Moreover, the Library intends to select all black and white prints received under this regulation. If the Motion Picture Agreement were available, this would lead to unnecessary back and forth transportation of prints between the Library and the depositor.

The Motion Picture Agreement is currently available in the case of the colorized videotape version.

(b) *Applicability of "best edition".* One comment requests confirmation that the Best Edition Statement of the Library of Congress is inapplicable. The Library would prefer deposit of the black and white print in the order of preference listed in the Best Edition Statement. We recognize, however, that older works may not be available in certain gauges, and would request that the registrants make a good faith effort to deposit the best available film print, in particular a print that is clear, undamaged, undeteriorated, and free of splices. We understood that restoring or cleaning the black and white print before colorization involves preparation of an excellent quality print. If

preservation of the black and white print is one of the benefits of colorization, the Library would expect that a "complete" black and white print will be deposited to achieve that benefit for posterity. Special relief is available, of course, if the requirement cannot be satisfied in a particular case, for example, where a black and white kinescope copy is colorized.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is a part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5 Chapter 5 of the U.S. Code, Subchapter II and Chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.*

* The Copyright Office was not subject to the Administrative Procedure Act before 1976, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e., "all actions taken by the Register of Copyrights under this title [17], except with respect to the making of copies of copyright deposits"). [17 U.S.C. 701(o)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

List of Subjects in 37 CFR Part 202

Claims. Claims to copyright, Copyright registration.

Final Regulation

In consideration of the foregoing, the Copyright Office is amending Part 202 of 37 CFR, Chapter II.

1. The authority citation for Part 202 continues to read as follows:

Authority: Copyright Act, Pub. L. 94-553, 90 Stat. 2541 [17 U.S.C. 702].

2. Section 202.20(c)(2)(ii) is amended by adding the following sentence at the end thereof:

§ 202.20 Deposit of copies and phonorecords for copyright registration.

(c) * * *

(2) * * *

(ii) *Motion pictures.* * * * In the case of colorized versions of motion pictures made from pre-existing black and white motion pictures, in addition to the deposit of one complete copy of the colorized motion picture and the separate description of its contents as specified above, the deposit shall consist of one complete print of the black and white version of the motion picture from which the colorized version was prepared. If special relief from this requirement is requested and granted, the claimant shall make a good faith effort to deposit the best available, near-archival quality black and white print, as a condition of any grant of special relief.

Dated: July 28, 1988.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 88-17888 Filed 8-6-88; 8:45 am]

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The Financing of Motion Pictures

In this attachment, Mr. Schwartz describes how motion pictures are financed -- who bears the burdens of the financial risks and under what conditions.¹ Although not central to our assignment, this topic bears importantly on the environment in which the parties must operate. Many of the parties involved today in film financing are new, but today, as always, motion pictures are still prepared as works made for hire. The people who own the copyright are not necessarily the same people who bear the financial risks in a work. This fact of copyright ownership does, however, explain who has the basic creative control over the work itself, and any subsequent derivative works, outside of any formal contract specifying creative control.

The courts have applied contract principles to interpret the rights retained by creative artists or the rights assigned by the copyright owners. "Once the rights of ownership are transferred by the original filmmaker, the copyright statute will not protect the integrity of the original film, unless the filmmaker provides for protections in the contract."²

Of course, under the traditional copyright principle of the divisibility of rights, the right to exploit a work for other markets--markets created by the techniques of colorization, panning and scanning, or

¹ For a full discussion of these issues See Jason E. Squire, The Movie Business Book, Simon & Schuster, Inc. (1983), which is a collection of 42 essays about the movie business written by individuals in the industry.

² Elise K. Bader, A Film of a Different Color: Copyright and the Colorization of Black and White Films, 5 Cardozo Arts and Entertainment, 497, 531.

lexiconning -- can be contracted for without regard to the integrity of the original work. In the case of motion pictures, sometimes as many as five hundred prints are issued for the first theatrical release, and it is possible for all five hundred to be of different lengths and variations within a year, due to editing and post-production changes in the various theaters, not to mention the different copies owned or leased by television studios and the various videocassette formats offered for sale or rental.

The financing of motion pictures is risky in an investment sense--most films lose money. Producers argue that since they take the brunt of the financial risks, they should generally own the rights to exploit the works using every available technology in every available marketplace.

The Producer and the Economics of Filmmaking

The role of a film producer has become somewhat blurred today because, in part, there are so many different ways of crediting production functions in a film including: "produced by," "presented by," "executive producers," "associate producers," and "executive in charge of production." All of these terms have no meaning without understanding what role the individual or company plays, whether this "producer" is a financial arranger and investor, or a packager of creative material with the artists, directors and studios all pre-arranged, or an agent of the film's star, or something else altogether.³

Basically, there are five stages of picture making: research and development, pre-production, production, post-production and marketing.

³ William Goldman, Adventures in the Screen Trade, 1983, page 60.

The difference between the "pure producer" and the "packaging producer," is how far along in this process the producer continues to maintain a financial risk.⁴

Since it is too difficult to describe the whole array of possible roles a producer might have, what follows is a somewhat traditional explanation of the functions and financial risks incurred. In most instances, the producer starts work on a film project (the research and development stage) with the purchase and clearance of copyrighted material in the form of a book, a screenplay or a treatment (a long synopsis of the events of a story). This can be done either by purchasing or optioning the material from the author or screenplay writer.⁵ In some instances, a well-known screenwriter can enter into a partnership with the writer and jointly negotiate with the producer for a share of his profit.

Under such an arrangement, the writer takes a risk along with the producer, but he also stands to be rewarded along with the producer if they're successful. This doesn't mean that the pooling and division necessarily result in a 50/50 split. It could be 66/33, 75/25, 60/40, or some other percentage. But the pooling and division partnership has become a rather frequently used device to accomplish a deal between a producer and a writer or the owner of a piece of material when

⁴ Robert Evans, The Producer contained in *ibid.* Squires, page 14.

⁵ Options are usually for a period of time, for example one year, with a renewal period, often an additional year, after which the author/screenwriter can sell his work to another buyer if the purchaser of the option doesn't exercise the option. The second year of the option is usually necessary to give the producer time to start the production and to secure financing. How much money the author/screenwriter gets for the option depends of course on the material itself, the reputation and success of previous works by this author etc. Usually, there is a cash payment for the option and a bonus if the option is exercised. The latter provision is either in the form of cash and/or a "back end" deal to provide a percentage of the picture's net profits to the writer. From Norman H. Garey, Elements of Feature Financing, contained in *ibid.* Squire, pages 96-106.

the producer doesn't want to lay out a lot of money and the writer doesn't want to accept short money up front without a commensurate back-end reward for doing so.⁶

Work for hire development deals are the most common methods for producers to hire screenwriters, either paying the writer with the studio's development money or with the producer's own money. Often the writer will be paid more than the Writers Guild minimum by giving the writer a large cash fee and a share of the profits and a share of the subsidiary or separated rights (such as theatrical and television sequel, print-publishing, and merchandising rights).⁷

After the copyrighted material is obtained and cleared and the screenwriter is paid, the producer must obtain production financing to begin developing the picture. The producer can act as a packager of the creative material (consisting of the script and the rights), and of the creative talent (actors and/or director) and sell the package deal to the financier, either an independent production company or a major studio.⁸ Or the producer can create a "mini-package" consisting of the script, rights, and producer's services and sell that to the studio. The studio then must hire the director, the actors and actually shoot the picture and take the development risk (that the picture will even be made at all) based on what they purchase, which is a script and the copyright to the script plus any other production services the producer is selling.

⁶ Ibid., Garey contained in Squire, page 97.

⁷ Ibid. Garey/Squire page 98.

⁸ The difference between these two entities is that only the major studios have distribution arms, which is necessary to get every film from the production/post-production stage out to the general public.

The further a producer has moved the project-- that is, the greater the investment he has made in terms of time, effort, and money and the more finished the product he is delivering -- the more he's going to get for it both in cash and in back-end contingent interest. If he's in a position to bring in what is nearly a completed movie that just hasn't been shot yet, he's going to be able to make the best deal with the financier. However, there are some risks to this approach, both strategic and financial.⁹

All the activities that proceed the actual setting of a starting date are part of the research and development stage. Once they set a start date for shooting the pre-production stage begins.¹⁰ One of the highest financial risks for producers in film production is the completion guarantee -- actually getting a picture made after beginning the development deal.

A completion guarantor is a kind of cost insurer, or insurance company. He agrees (for a premium usually computed as a percentage of the picture's production costs) that out of his resources or financial contacts, he will guarantee the money necessary to complete the picture if the money that has been raised from other sources turns out to be inadequate; for example, if the picture runs well over the original budget.¹¹

The longer the producer stays in the process and guarantees completion the more financial rewards he or she is entitled to, including copyright ownership. Generally, if the producer simply packages the deal, then signs a contract with a studio to have the studio actually make the picture, with the producer providing personal services, the studio will own the copyright. This is the case with a "packaging producer," who is in a

⁹ Ibid. Garey/Squire at page 99.

¹⁰ Ibid., Evans contained in Squire, page 16.

¹¹ Ibid., Garey contained in Squire, page 100-101.

work made for hire agreement with the studio/copyright owner.

If however, the producer acts as a "pure producer" and continues to make the picture with independent financing, renting equipment, hiring the actors -- generally financing both "above the line" and "below the line" costs,¹² then the producer will own the copyright and will then have to assign the rights to the distributor. Here the producer is at great risk, assuming all of the production costs, and he or she is rewarded with copyright ownership. He or she will be able to make more money, however, by negotiating for ancillary rights, including the soundtrack album and publishing rights to the film's music, merchandising rights, and any book publishing rights associated with the film. The risks involved in filmmaking have increased for producers and studios as fewer pictures make profits and as costs rise. For example, "below the line" costs have tripled since 1967.¹³

The actual production costs of a film include studio overhead, which is computed as a percentage of the total production costs. The amount is charged by the studio for the costs of producing the film itself and must be

¹² Above the line costs are: the fixed costs of the key creative costs prior to the beginning of shooting, including the personnel costs (and all travel expenses for location pictures) for the producers, writers, actors, directors and the purchase costs of the story and other rights connected with the acquisition of the underlying literary material including the screenplay costs. Below the line costs are: the costs incurred in physically making the picture including all the other personnel and materials. Usually, below the line is broken down into three sections, production period, post-production period, and "other charges." From Paul Maslansky, The Line Producer contained in *ibid.*, Squire, page 209.

¹³ *Ibid.*, Evans contained in Squire, page 16.

figured into the film's budget.¹⁴ On independent pictures (i.e., not made by studios), there is no overhead charge but, instead, a charge for the rental of all the studio facilities and services (usually charged on a per studio day basis).

The production stage concludes when filming is completed. Next comes the post-production stage involving the editing of the film, the scoring of music and the synchronizing of sound, and finally the making of prints for distribution into theaters. The director, by contract, has the right to edit the film and turn in his version, known as the "Director's Cut." After that, the producer can edit the film into its final version usually in some collaborative effort with the director and editor. As producer Robert Evans says,

In post-production, I work most closely on the editing. It's taken me many years to build respect with directors and editors, and this, too, is very much a collaborative effort. The director has the prerogative to mold and shape the film in his cut. Then, I work with him and the editor to fine tune the editing process, which is critical to the form and impact of the final picture.¹⁵

The fifth and final stage of filmmaking is the marketing stage, which involves the advertising and distribution of the picture. For distribution a major distributor (all the major studios have distribution arms) must be used to make the "teaser" (the coming-attractions) for theaters and television, to organize the print advertising campaigns, to set the dates,

¹⁴ "It covers services from preparing legal contracts, researching copyrights, making out payroll and accounting for production and distribution to simple janitorial and maintenance services. Most studios also provide cameras, lights, grip equipment, editorial and transportation equipment, offices, and projection facilities for the overhead charge." From Roger L. Mayer, Studio Operations, contained in *ibid.*, Squire, page 159.

¹⁵ *Ibid.*, Evans contained in Squire, page 18.

terms and theaters for release of the picture, to make foreign language copies (dubbed or subtitled), to preview the film, and finally, open the film. Because of the huge risks and expense involved in distribution, a large percentage of the films costs, including returned profits, goes to the distributor. The domestic box-office gross on all films released in 1980 was over \$2.7 billion, and the costs of marketing films was about 25 percent of that or a little over \$700 million, which includes advertising, promotion, and market research.¹⁶

The more studio money the producer accepts and the earlier he accepts it, the greater the risk he asks the studio to take and the more the studio will expect to be rewarded for it. Again, the risk/reward ratio operates. If the financier-distributor is asked to take the entire production risk, the best the producer can expect -- assuming he's assembled all the elements and has paid the entire development cost -- is usually a 50/50 net profit deal. For that much risk, the financier-distributor is generally considered to be entitled to at least 50% of the net profits, and perhaps more, and to insist on the standard distribution fee of 30% for the U.S. and Canada.¹⁷

For all of the risks associated with the making of motion pictures, the producer usually ends up with 10-20 percent of the net profits and often less after paying for profit participation by others, especially the distributor and the creative participants, including the writer and the director and, in some cases the star.¹⁸ Of course, because of the producers role in making a motion picture, and because of the financial risks he or

¹⁶ Richard Kahn, Motion Picture Marketing, contained in *ibid.*, Squire, page 264 and 270.

¹⁷ *Ibid.*, Garey contained in Squire, page 103. An excellent example of the breakdown of profits is provided at the bottom of page 103 continued on page 104.

¹⁸ *Ibid.*, Garey contained in Squire, page 103.

she takes, "pictures with runaway costs can be traced to negligent producers or financing sources."¹⁹

The Director, Screenwriter and Other Creative Participants

Making a movie is analogous to building a building on a lot. The literary property is the lot, the piece of real property. The movie is analogous to the building. The screenwriter is the architect, the director is the contractor, and the producer is theoretically the owner. The major studio (if one is involved) can variously represent a lending institution, equity partner, and/or leasing agent for the finished building (in its capacity as distributor).²⁰

The director is hired by the producer (or by the studio if it is the producer) in most cases as an employee in a work made for hire situation. The director signs a service contract and gets a flat fee and may also receive net profit participation.²¹ Many actors and directors also get "holding money" or option money. Since star actors and directors will not agree to undertake a project in development unless they are certain they get

¹⁹ Ibid., Evans contained in Squire, page 15. For additional information on the financial and accounting practices in the motion picture industry, see *ibid.*, Vogel, Entertainment Industry Economics, chapter 4, especially part 4.4, beginning at page 101. Vogel describes the production-financing-distribution (PFD) agreements used by most producers, participation deals (including "pick-ups" of incomplete projects), and producers' participation and cross-collateralization deals which are used in the industry today.

²⁰ Ibid., Garey contained in Squire, page 102.

²¹ "There may be half a dozen directors in the world who command first dollar gross participation of a significant kind, and hardly any writers who can. However, there are many actors and directors, and even a few writers, who are given gross participation from break-even, that is, once break-even is achieved." From Garey contained in Squire, page 105. In addition, directors, writers and actors get fringe benefits under their guild contracts which can add as much as 20% to the labor costs of making a picture. From Paul Maslansky, The Line Producer, contained in Squire, page 209.

compensated, they are paid this money to pledge their availability.

By signing net profit participation schemes (and, only very rarely, gross profit arrangements), directors, like producers, share the risk of financial failure on the pictures they direct. But, in most cases, they are compensated primarily as employees under work made for hire arrangements so they are paid whether or not the picture is a success. But damage to their reputation can have severe economic consequences for the future of their directorial careers. Operating as Hollywood does under the motto -- "You're only as good as your last picture" -- directing a bad picture can have severe career consequences.

If the commercial failure of a picture is blamed on a pre-production or production problem such as a poor script or a low budget, the director has no one to blame but himself or herself, since they agreed by contract to the script and budget and the actual filming when they signed onto the project. But post-production changes, only provide for minimal rights of "consultation" (though the directors have agreed to this consultation right by contract)²² for any editing, colorization, panning and scanning, or lexiconning which the producer/copyright owner agrees to. Worse yet, a poor or nonexistent marketing scheme on a picture can ruin its financial chances. Obviously, if the picture is going to be a commercial success, the studio marketers know it and will spend the money on it. But often the directors bear the brunt for failures. In a just world they might share the blame with the producers, but most often the finger of blame points at them. Often the directors of today "function as their own producers, though they

²² Article 7, 1987 Agreement of Basic Minimum Rights between the Directors Guild of America and the Alliance of Motion Pictures and Television Producers.

are not credited as such."²³ This is because of the fact that many "producers" are simply business dealmakers with no creative experience-- and this vacuum must be filled by the director.²⁴

Screenwriters have even fewer financial risks than directors and have even less influence in the creative process. Usually they are compensated, often well compensated, up front, bearing few of the financial risks of picture-making, unless they participate in profit participation agreements. William Goldman, a well-known screenwriter says that screenwriters are not supposed to have collaborative powers in creating films. "Long ago, Hollywood decided that the way to keep people quiet is to overpay them. An author paid all that money should go home and count it and be content."²⁵

According to Goldman, only the well established screenwriters have the power to influence the details of the production of a film.

Generally, the answer is that the writer gets as close to the production as his director allows. The production is really the director's baby. If he has faith in the author's judgment, the director will be more willing to tolerate his presence during filming. If the director doesn't want him, there is nothing the writer can do about it.²⁶

Goldman says that an author is "blessed" if the director is interested in working with him in production (and pre-production). The situation for screenwriters is very different than for playwrights.

The motion picture producer acquires all rights necessary to alter or change the screenplay in any

²³ Ibid., Sydney Pollack, contained in Squire at page 28.

²⁴ Id.

²⁵ William Goldman, The Screenwriter, contained in ibid., Squire at page 58.

²⁶ Id., page 59.

manner which he feels is appropriate and ... requires the writer to waive rights of 'droit moral.' Except in rare instances, he will be authorized to produce the picture using any directorial, acting and other talent which he determines. Conversely, the producer of a play generally acknowledges that the play is an artistic creation of the author and agrees that the author is entitled to approval over the cast and director, and when appropriate, conductor and dance directors. Further, once the completed script has been delivered, no addition, alteration, or omission may be made without both the author's and producer's consent.²⁷

Compare this situation to what director and screenwriter Mel Brooks says in acknowledging the different amounts of creative control his different roles afford him. "I direct a film to protect the writing. I produce a film to have total business control as well as creative control over the film's future."²⁸

For screenwriters, as with directors, however, once they lose control -- whether creative or commercial -- they feel powerless to salvage the work or their reputation. Goldman says that when Butch Cassidy and the Sundance Kid, for which he wrote the screenplay, opened in New York, the reviews in the three daily papers were split -- "two terrific, one pan. In neither of the laudatory reviews was my name even mentioned. But you better believe I got top billing in the pan. I had screwed up [director] George Hill's

²⁷ Michael I. Rudell, Behind the Scenes: Practical Entertainment Law, Law & Business, Inc., (1984), page 123. According to Rudell, since movies rarely make money, profit participation agreements are of little value to screenwriters, while playwrights, often sharing in gross box office receipts often profit handsomely (so long as the play is running). Id., page 124.

²⁸ Mel Brooks, My Movies: The Collision of Art and Money, contained in *ibid.*, Squire at page 36.

If producers take the primary financial risks, then directors and writers primarily take reputational risks. The producer is most worried about completing a picture and he or she gambles on the creative participants to do this. Returning to the building metaphor, one commentator has compared a director to a general contractor. "He's responsible for building the building, and if the costs are going to run over, it'll probably be because of him."³⁰

All of the other creative talents -- the cinematographer, editor, art director and the "crew" -- are employees for hire paid under service contracts for single pictures, or multiple service contracts. Because films are by nature "research and development products ... they are perishable and cannot be test marketed in the usual sense."³¹ Since most of the creative talent, including the directors, screenwriters and "below the line" employees, are paid as employees, their share in the financial risks is reduced considerably. Only for directors and screenwriters with profit participation agreements are the rewards for financial success tied to the picture's success. But the downside is that these two creative artists share in the reputational hazards of unsuccessful pictures as well. The increase in other financial markets, such as the videocassette market, and twenty years ago, the television market, has rewarded the producers more than any other participants in filmmaking. But the directors and

²⁹ William Goldman, Adventures in the Screen Trade, Warner Books, 1983, page 79.

³⁰ Ibid., Garey contained in Squire at page 101.

³¹ Harold L. Vogel, Entertainment Industry Economics: A Guide for Financial Analysis, Cambridge University Press (1986), page 89.

screenwriters share in the profit-making from these other markets, especially television.³²

In sum, the directors, arguing for all creative artists, said, "it is not entrepreneurs alone that rely on the developed systems of publishing, marketing, licensing, reproducing, and syndicating artistic materials. Artists rely on these systems, too."³³ And artists clearly have a stake in the economic well-being of the industry upon which they depend for their livelihood, and generally can be relied on to act accordingly.

³² In 1960 four guilds (the Directors Guild of America, Screen Actors Guild, Writers Guild of America and the American Federation of Musicians) signed collective bargaining agreements with the Association [now called the Alliance] of Motion Picture and Television Producers which waived the guild's rights to revenues in theatrical motion pictures made prior to 1960 and released on free television. In exchange each of the guilds was given a cash settlement for the establishment of pension plans for their members. For theatrical motion pictures made since 1960, which are released on free television, the guilds divide up a total of 12 1/2% of the gross revenues from those pictures (the guilds share is: 1.2% each for the DGA and WGA, 3.6% for the SAG, 1% for the AFM and 5.4% for the International Alliance of Theatrical and Stage Employees (IATSE)).

³³ Statement of the Directors Guild of America before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, September 30, 1987, page 6, reprinted in the Directors Guild of America prepared statement for the Copyright Office hearing of September 8, 1988, docket RM 88-3, comment letter 8, August 24, 1988.

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